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State Motor Vehicle Franchise Legislation: A Survey and Due Process Challenge to Board Composition

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NOTES

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I. INTRODUCTION

In today's economy, franchising is becoming a mature, dynamic, and ever pervasive business activity.[1] Sales of goods and services by approximately 492,000 franchise establishments are expected to reach $299 billion in 1979.[2] Meanwhile, these establishments employed an estimated 4,150,759 workers in 1977.[3]

One of the more typical franchising activities is the sale of motor vehicles. Motor vehicle dealers comprised roughly six to ten percent of the total number of franchise establishments in the past decade.[4] Despite the decreasing number of motor vehicle franchises, they have nevertheless managed to dominate every other classification of franchising establishment in total sales volumes.[5]

The development of the independent[6] franchise as a distribution device began in the earliest days of automobile manufacturing in response to the unique problems and conditions that surrounded the automobile industry.[7] These franchises, in large part due to the overwhelming economic power of automobile manufacturers, were loosely drawn agreements designed through omission, and later exemption, to reduce manufacturers' liability.[8] Confronted by courts

1. U.S. DEP'T OF COMMERCE, FRANCHISING IN THE ECONOMY 1977-1979, 1 (1979) [hereinafter cited as FRANCHISING].

2. *Id.*

3. *Id.*

4. *Id.* This percentage has declined from 9.8% (37,800 out of 383,908 total franchises) in 1969 to 7% (31,680 out of 450,800 total franchises) in 1977. *Id.* at 38-41. Statistics indicate that the total percentage will continue to decline for 1978 and 1979 to 6.8% (31,600 out of 467,278 total franchises) and 6.4% (31,510 out of 492,379 total franchises) respectively. *Id.* at 33-34.

5. The following annual figures show the sales of automobile dealers as a percentage of total sales of all franchises: 1969 (53%); 1970 (49%); 1971 (55%); 1972 (55%); 1973 (55%); 1974 (50%); 1975 (49%); 1976 (52%); 1977 (52%); 1978 (est. 52%); 1979 (est. 52%). *See id.* at 33-37.

6. "Independent" is used to distinguish privately owned dealerships from those that are actually owned by the manufacturer, called factory branch outlets. Today, virtually all new cars are sold to the public through independently owned franchised dealers. *See* L. WHITE, THE AUTOMOBILE INDUSTRY SINCE 1945, 136-37 (1971). During the past few years, only 300 auto dealer franchises were company owned. *See* FRANCHISING, *supra* note 1, at 32-35, 39-40.

7. *See* notes 18-20 *infra* and accompanying text.

8. *See* notes 21-31 *infra* and accompanying text.

that universally allowed manufacturers to escape franchise liabilities,[9] dealers increasingly turned to legislatures for statutory relief.[10] The resulting extensive state[11] and federal[12] legislation was designed to regulate the manufacturer-dealer relationship and to equalize the power of the dealer vis-a-vis the manufacturer.

This Note briefly traces the rise of the franchise as the primary automobile distribution device, the problems that confronted early dealers, and their subsequent inability to secure judicial relief. After examining dealers' efforts in the legislatures and the resulting statutes this Note points out several infirmities that exist regarding state automobile franchise regulation. The Note then focuses upon a particular constitutional challenge to state automobile franchise legislation. Finally, the Note concludes that such legislation is either genuinely ineffective or leads to the anomalous result that dealers assume more powerful positions with respect to their manufacturers through unconstitutional means. Based upon these conclusions, the Note proposes reform and/or abolition of state and federal regulation of manufacturer-dealer franchise relationships.

II. THE AUTOMOBILE MANUFACTURERS AND THEIR DEALERS

A. *The Rise of the Franchise as an Automobile Distribution Device*

Retail outlets generally take one of three forms. At one extreme is the independent retailer, exemplified by the corner drugstore. His independence is usually safeguarded because he is not a "captive" of any one manufacturer. Instead, the manufacturer or wholesaler from whom he buys is only one of many possible sources of supply. At the other end of the spectrum is the agent who may be a branch or subsidiary of the manufacturer. Somewhere within that continuum is the franchised dealer.[13]

Franchising has been described as "a preferred method of distribution by companies of all sizes [providing] an easy and efficient distribution system at little cost and with little of the irritations and

9. *See* notes 32-44 *infra* and accompanying text.

10. *See* notes 53-69 *infra* and accompanying text.

11. *See* notes 94-195 *infra* and accompanyng text.

12. *See* notes 72-93 *infra* and accompanying text.

13. Case law recognizes that franchises are neither pure sales contracts nor pure agency contracts. Bendix Home Appliances, Inc. v. Radio Accessories Co., 129 F.2d 177, 181 (8th Cir. 1942); Marrinan Medical Supply, Inc. v. Fort Dodge Serum Co., 47 F.2d 458, 460 (8th Cir. 1931); Laveson v. Warner Mfg. Co., 117 F. Supp. 124, 125-26 (D.N.J. 1953); Kane v. Chrysler Corp., 80 F. Supp. 360, 363 (D. Del. 1948); Note, *Dealer Franchise Agreements*, 63 HARV. L. REV. 1010, 1015-16 (1950). The difficulties in fitting the relationship into established categories are discussed in C. HEWITT, AUTOMOBILE FRANCHISE AGREEMENTS 189-206 (1956).

responsibilities of an integrated system."[14] It has also been termed the "last frontier of the independent businessman" due to its appeal to the twelve percent of the population whose skin color has prevented their meaningful participation in the economic mainstream[15] and the millions of ordinary citizens whose life savings are available to acquire their own business.[16] Franchising continues to offer growing opportunities for minority participation.[17]

These factors, however, were of little consequence during the birth of the automobile industry. In its infancy, the automobile industry consisted of a number of small producers with limited capital and production facilities.[18] Sales were originally made directly to the consumer from the manufacturer. This method of distribution, however, soon proved inadequate. The consumer demanded services that the manufacturer was not in a position to render. Further, this system required a large capital investment in sales outlets—capital that was necessary for expansion of production facilities.[19]

Consequently, manufacturers developed independent distribution systems under which automobiles were sold to independent dealers who then sold to the consumer. The franchised dealers, originally designated as "exclusive agents," paid substantial cash deposits in advance of cars ordered, and paid the balance upon delivery. This arrangement provided an important source of working capital for the manufacturer. It also freed capital by providing showrooms and repair and storage facilities.[20] Due to the designation of these dealers as "agents," however, liability was often imposed upon the manufacturers for breach of warranty,[21] misrepresentation,[22] nonperformances,[23] and wrongful termination.[24] The manufacturers unsuccessfully sought to remedy the situation by avoiding agency langnage and designating the dealer a "vendee."[25]

The problems of the franchise, however, did not become press-

14. H. BROWN, FRANCHISING: REALITIES AND REMEDIES 2 (2d ed. 1978).

15. Sayre, *Franchising In The Ghetto,* 25 BUS. LAW. 73 (Special Issue 1969).

16. *See* Brown & Cohen, *Franchising: Constitutional Considerations For "Good Cause" State Legislation,* 16 HOUS. L. REV. 21 (1978).

17. FRANCHISING, *supra* note 1, at 7-8.

18. L. SELTZER, A FINANCIAL HISTORY OF THE AMERICAN AUTOMOBILE INDUSTRY 19 (1928).

19. For a complete account of the factors that led to the development of the franchise method of distribution, see C. HEWITT, *supra* note 13.

20. *Hearings Before the Subcomm. on Commerce and Finance of the House Comm. on Interstate and Foreign Commerce,* 84th Cong., 2d Sess. 94 (1956).

21. Columbia Motors Co. v. Williams, 209 Ala. 640, 96 So. 900 (1923).

22. Joslyn v. Cadillac Auto. Co., 177 F. 863 (6th Cir. 1910).

23. Dildine v. Ford Motor Co., 159 Mo. App. 410, 140 S.W. 627 (1911).

24. Isbell v. Anderson Carriage Co., 170 Mich. 304, 136 N.W. 457 (1912).

25. This designation, however, failed to insulate the manufacturer completely from liability. *See, e.g.,* MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916).

ing until concentration of production and excess capacity forced manufacturers to drive their dealers for volume sales.[26] Manufacturers then made efforts to exercise more control over dealers' capital investments, sales quotas, business policies, and promotional efforts.[27] The manufacturer was able to gain such control by using his superior bargaining position to obtain advantageous agreements with his dealers.[28] The control was manifested through retention by the manufacturer of the power of termination. Initially the franchise could be terminated "for cause," or for "unsatisfactory" dealer performance. Later, termination was possible at the will of the manufacturer.[29] As a result, the dealer, fearing the loss of the substantial capital invested in his dealership, was extremely vulnerable to pressure exerted by the manufacturer to increase car quotas, a measure that often burdened the dealer with unwanted cars and parts.[30]

26. As stated by one commentator:

> [By 1920] technological improvements left the manufacturer with large production capacities and high fixed costs. These fixed costs had to be amortized over a large amount of production (and sales) if the manufacturers were to realize profits. These and other factors led to a shift in the emphasis of dealer controls. The new emphasis was on volume. The manufacturers put pressure on their dealers to both maintain and increase their quotas.

C. HEWITT, *supra* note 13, at 65.

27. S. REP. No. 1879, 84th Cong., 2d Sess. 78 (1956).

28. In Buggs v. Ford Motor Co., 113 F.2d 618 (7th Cir.), *cert. denied*, 311 U.S. 688 (1940), the court stated:

> An examination of its terms, which are many, indicates that it was dictated by the manufacturer at Detroit, and drawn by its counsel with the avowed purpose of protecting the manufacturer to the utmost and granting, if any, few rights to, and the smallest possible protection of, the agent.
>
> It is one which affords some support for the wisdom and necessity of legislation which protects the weak against a strong party in situations like the instant one.

113 F.2d at 619.

29. *See* Note, *supra* note 13, in which the commentator stated:

> In practice, whether the manufacturer can control his dealers depends upon how necessary it is to them to retain his franchise. Where the dealer does become dependent upon the manufacturer, the chief function of the franchise is not to provide particular controls over the dealer's operations, since economic leverage alone is sufficient, *but to preserve the manufacturer's ultimate sanction, which is his ability to terminate the relationship* without being subjected to large liability in damages for breach of contract.

Id. at 1012 (emphasis supplied).

30. *See* United States v. General Motors Corp., 121 F.2d 376 (7th Cir. 1939), *cert. denied*, 314 U.S. 618 (1941); FTC, REPORT ON THE MOTOR VEHICLE INDUSTRY, H.R. DOC. No. 468, 76th Cong., 1st Sess. 1075 (1939) [hereinafter cited as FTC REPORT]. The manufacturer's power is best illustrated by a case in which it was used to the utmost. Ford once used its power to refinance its manufacturing plant. In early 1921, Ford was faced with obligations of approximately $58,000,000 incurred as a result of the Ford family's purchase of minority interests in the company. The obligations came due during a business recession that had retarded car sales and lowered car prices, but had not yet reduced the costs of materials and parts. Ford continued full production during late 1920, but held its purchases of parts to a minimum, transforming its stock of parts into finished automobiles. The Company then shut down the plant and shipped the cars to the dealers with sight drafts attached to the bills of

Thus, as one commentator noted, the automobile franchise became a "contract of adhesion."[31]

B. *The Dealers' Early Defeats in the Courts*

Confronted with dealer actions brought to enforce franchise agreements, the courts, with few exceptions, sustained the manufacturer's interpretation of the agreement. Several stated that the dealers failed to state a cause of action when suit was brought on the agreement alone.[32] Typical of the manufacturer's defenses to the agreement were the following:

> (1) That it did not constitute a legal contract;
> (2) That it lacked mutuality, and represented no legally enforceable obligation on the part of the seller to sell or on the part of the dealer to buy;
> (3) That it provided that the dealer shall perform to the satisfaction of the seller, and that the question of satisfaction is for the seller alone to determine;
> (4) That no damages were recoverable by the dealer since loss of profits were not contemplated by the parties;
> (5) That it was unenforceable and void because of indefiniteness, uncertainty and lack of consideration;
> (6) That, if valid, the agreement gave the factory the right to terminate at will.[33]

For many decades, the invalidity argument was the most powerful weapon available to manufacturers in defending damage suits by dealers.[34] It was honored by most courts, provided the manufacturer engaged in careful draftsmanship.[35] In the late thirties, however, the courts' attitude began to change, even with regard to terminable-at-will franchises.[36] Nevertheless, dealers were usually unable to recover if the manufacturer terminated or failed to renew the agreement.[37]

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lading. Dealers were thus forced to buy a surplus of 130,000 vehicles and thereby accept the burden of meeting the Company's obligations. *See generally* J. PALAMOUNTAIN, THE POLITICS OF DISTRIBUTION 118-19 (1955).

31. *See* Kessler, *Automobile Dealer Franchises: Vertical Integration by Contract*, 66 YALE L.J. 1135, 1155 (1957).

32. S. REP. No. 1879, 84th Cong., 2d Sess. 79 (1956).

33. H.R. REP. No. 2850, 84th Cong., 2d Sess. 5 (1956).

34. *See, e.g.*, Huffman v. Paige-Detroit Motor Car Co., 262 F. 116 (8th Cir. 1919); Oakland Motor Car Co. v. Indiana Auto. Co., 201 F. 499 (7th Cir. 1912); Velie Motor Car Co. v. Kopmeier Motor Car Co., 194 F. 324 (7th Cir. 1912).

35. *See* Kessler, *supra* note 31, at 1150.

36. *See, e.g.*, Bushwick-Decatur Motors, Inc. v. Ford Motor Co., 116 F.2d 675 (2d Cir. 1940); Buggs v. Ford Motor Co., 113 F.2d 618 (7th Cir.), *cert. denied*, 311 U.S. 688 (1940).

37. Even when dealers overcame these obstacles, the manufacturer could escape liability by arguing that the alleged damages were not "within the contemplation of the parties" or because he had successfully insulated himself by nonliability clauses. Kessler, *supra* note 31, at 1152.

With several defenses blunted, manufacturers began to invoke termination clauses regularly in order to control dealers and their operations.[38] Even though the courts were totally aware of the one-sidedness of the franchise contract, dealers' challenges to such terminations were generally rejected. The oft-cited decision of *Ford Motor Co. v. Kirkmyer Motor Co.* is characteristic of this sincere belief in freedom of contract.[39] The court stated:

> It appears that the [dealer] has been disappointed in its expectations and has been dealt with none too generously by the [manufacturer]; but, while we sympathize with its plight, we cannot say from the evidence before us that there has been a breach of binding contract which would enable it to recover damages. While there is a natural impulse to be impatient with a form of contract which places the comparatively helpless dealer at the mercy of the manufacturer, we cannot make contracts for parties or protect them from provisions of contracts which they have made for themselves. Dealers doubtless accept these one-sided contracts because they think that the right to deal in the product of the manufacturer, even on his terms, is valuable to them, but, after they have made such contracts, relying upon the good faith of the manufacturer for the protection which the contracts do not give, they cannot, when they get into trouble, expect the courts to place in the contracts the protections which they themselves have failed to insert.[40]

The courts also refused to impose a condition of good faith upon the manufacturer's power to terminate.[41] Thus, the court in *Bushwick-Decatur Motors, Inc. v. Ford Motor Co.*[42] stated:

> With a power of termination at will so unmistakably expressed, we certainly cannot assert that a limitation of good faith was anything the parties had in mind. Such a limitation can be read into the agreement only as an overriding requirement of public policy. This seems an extreme step for judges to take. . . . [G]enerally speaking, the situation arises from the strong bargaining position which economic factors give the great automobile manufacturing companies: the dealers are not misled or imposed upon, but accept as nonetheless advantageous an agreement in form bilateral, in fact one-sided. To attempt to redress this balance by judicial action without legislative authority

38. S. REP. No. 2073, 84th Cong., 2d Sess. 2 (1956) (the threat of termination made the dealer a "pliable tool").

39. 65 F.2d 1001 (4th Cir. 1933).

40. *Id.* at 1006. *See also* S.B. McMaster, Inc. v. Chevrolet Motor Co., 3 F.2d 469, 473 (E.D.S.C. 1925) ("they are entirely within their rights in so framing their contract as to carry out their intention. The intentions of the parties in the absence of any ground of public policy must prevail, and their intention must be gathered from the terms of the contract itself."). The provision from *Kirkmyer* was referred to in both the House and Senate Reports on the Dealer's Day In Court Act as "representative of the thinking of the courts," S. REP. No. 2073, 84th Cong., 2d Sess. 3 (1956), and as demonstrating how "application of contract law concepts by the courts has prevented relief to the dealer." H.R. REP. No. 2850, 84th Cong., 2d Sess. 5 (1956). Commentators similarly have criticized this view of the courts. *See* Kessler, *supra* note 31, at 1156 ("unwarranted" and "unrealistic"); Comment, *The Automobile Dealer Franchise Act: A "New Departure" in Federal Legislation?*, 52 NW. U.L. REV. 253, 256 (1957).

41. *See* H.R. REP. No. 2850, 84th Cong., 2d Sess. 5 (1956); Kessler, *supra* note 31, at 1156.

42. 116 F.2d 675 (2d Cir. 1940).

> appears to us a doubtful policy. We have not proper facilities to weigh economic factors, nor have we before us a showing of the supposed needs which may lead the manufacturers to require these seemingly harsh bargains.[43]

This policy of judicial noninterference tended to increase the coercive practices of manufacturers toward their dealers.[44] As the court's comment in *Bushwick* illustrates, the courts were asking for *legislative* solutions to the dealers' problems. The courts, however, were not alone in that plea. Once it became apparent that individual lawsuits would not solve their problems, the dealers also appealed to state and federal legislatures for statutory relief.

C. Dealers' Appeals to Congress

1. The National Industrial Recovery Act

The dealers, threatened both by the vertical power of the manufacturers and the rigors of competition, turned to group action as a means of policing the latter and countering the former.[45] The chief spokesman for dealer demands was the National Automobile Dealers Association (NADA), founded in 1917.[46] The group action did not begin to gain momentum, however, until the Great Depression.

The dealers initially attempted to use laws already on the books to their advantage. The first step was utilization of the National Industrial Recovery Act (NRA).[47] The Act provided that members of an industry could create a code of fair competition in order to end cutthroat practices. It was hoped that this exemption from the antitrust laws would help end the depression. The automobile dealers' NRA code protected the dealers from the hazards of price competition,[48] leading commentators to term the period under the NRA as the "golden age of dealers."[49]

The manufacturers, however, loathed the period of the NRA. Although their opposition centered primarily upon the NRA's labor provisions, the retail codes also caused concern. The lack of aggres-

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43. *Id.* at 677.

44. *See* Note, *Statutory Regulation of Manufacturer-Dealer Relationships in the Automobile Industry*, 70 HARV. L. REV. 1239, 1242 (1957).

45. J. PALAMOUNTAIN, *supra* note 30, at 122.

46. *Id.* at 128.

47. 48 Stat. 195 (1933).

48. The dealers' NRA code forbade sales below list price plus taxes, extra equipment, and transporation and handling costs. It also prohibited certain "unfair" trade practices. The heart of the code, bowever, was tbe control of trade-in allowances. A code "Blue Book," published by NADA, listed used car values for given market areas. It was an unfair practice to grant allowances in excess of those publisbed values. *See generally* J. PALAMOUNTAIN, *supra* note 30, at 123. For a description of tbe code provisions, see FTC REPORT, *supra* note 30, at 366-67.

49. *See* Kessler, *supra* note 31, at 1168.

sive dealer competition caused a reduction in the demand for automobiles.[50] Thus, after the death of the NRA,[51] the manufacturers' pressure defeated attempts to retain the benefits of the NRA code through self-regulation.[52]

Following the loss of the NRA, dealers sought to retain its code and Blue Book. It was obvious, however, that under the existing antitrust laws the dealers could not achieve their objective—to engage in pure price-fixing. The dealers thus concluded that new laws were needed. Although they initially gained some minimal success in the states, they looked primarily to the federal government for relief.

2. The FTC Study and the Proposed Motor Vehicle Act of 1940

Unsatisfied with their limited success in the state legislatures, dealers appealed to congressmen of states that had passed legislation for federal aid. Ironically, those dealers who enjoyed the broadest state protection led the call for federal action.[53] The campaign began with Wisconsin Representative Gardiner Withrow's introduction of the "Withrow Resolution."[54] The resolution directed the Federal Trade Commission (FTC) "to investigate the policies employed by manufacturers in distributing motor vehicles, accessories, and parts, and the policies of dealers in selling motor vehicles at retail, as these policies affect the public interest."[55] After many hearings, the resolution was passed, authorizing an investigation on a scale far exceeding that contemplated by its sponsor.

The conduct of the hearings was largely unsympathetic toward the manufacturers. Meanwhile, the dealers believed they had found a receptive and sympathetic ear.[56] The dealers, however, were ultimately disappointed by the results of the FTC study that[57] described the operations and history of manufacturers, manufacturer-dealer relations, competition, and trade practices.

The Commission did find that there was a high degree of concentration within the motor vehicle industry and that by virtue of

50. *Id.*

51. The legislation was struck down as giving the force of law to regulatory codes drawn up by private industry associations. Schecter Poultry Corp. v. United States, 295 U.S. 495 (1935). *Schecter* will raise its head as a viable approach to striking down some provisions of state motor vehicle franchise regulation. *See* note 169 *infra.*

52. *See* J. PALAMOUNTAIN, *supra* note 30, at 123-30.

53. *Id.* at 133.

54. H.R.J. Res. No. 87, 75th Cong., 3d Sess., 52 Stat. 218 (1938).

55. *Id.*

56. J. PALAMOUNTAIN, *supra* note 30, at 134.

57. The FTC conducted a fairly thorough and extensive investigation before submitting its 1077 page report to Congress on June 5, 1939. *See* FTC REPORT, *supra* note 30.

their great vertical power, manufacturers were able to impose "unfair and inequitable conditions of trade" upon their dealers.[58] It pointed out, however, that this power had been used in furtherance of vigorous competition, and that despite their great size and power, manufacturers were innocent of price-fixing or other monopolistic restraints commonly associated with great size and power. Therefore, the Commission stated:

> Active competition among automobile manufacturers, although some of them have made very large profits, gave to the public improved products, often at substantially reduced prices. . . . Such competition has been the basis for the remarkable growth of the industry. *Consumer benefits from competition in the automobile-manufacturing industry have probably been more substantial than in any other large industry studied by the Commission.*[59]

Since the FTC found great size compatible with effective competition, it recommended only moderate limits upon the manufacturer's vertical power.[60] Furthermore, the FTC, while heaping praise and only mild condemnation upon the manufacturers, had little praise for the practices of the dealers, the very parties whose efforts had led to initiation of the study. Although it found that the individual dealer was competitive in his general push to sell motor vehicles, the FTC nevertheless found that dealers had often seriously limited competition.[61]

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58. *Id.* at 1058. For example, the FTC found that:

> [M]anufacturers . . . by reason of their great power . . . have been, and still are, imposing on their respective dealers unfair and inequitable conditions of trade, by requiring such dealers to accept, and operate under, agreements that inadequately define the rights and obligations of the parties and are, moreover, objectionable in respect to defect of mutuality; that some dealers, in fact report that they have been subjected to rigid inspections of premises and accounts, and to arbitrary requirements by their respective . . . manufacturers to accept for resale quantities of motor vehicles or other goods, deemed excessive by the dealer, or to make investments in operating plants or equipment without adequate guaranty as to term of agreement or even supply of merchandise; and that adequate provisions are not included for an equitable method of liquidation of such investment.

Id. at 1075-76.

59. *Id.* at 1074 (emphasis supplied). Keep this statement in mind when one reads the legislative findings that ostensibly are the basis for state motor vehicle franchise legislation. *See* notes 96-108 *infra* and accompanying text. If the consumer is already reaping benefits why is legislation needed to protect him?

60. It is recommended that present unfair practices be abated to the end that dealers have (a) less restrictions upon the management of their own enterprises; (b) quota requirements and shipments of cars based upon mutual agreement; (c) equitable limitation in the event of contract termination by the manufacturer; (d) contracts definite as to the mutual rights and obligations of the manufacturers and the dealers, including specific provision that the contract will be continued for a definite term unless terminated hy breach of reasonable conditions recited therein.

Id. at 1076.

61. [L]ocal associations of motor-vehicle dealers . . . have engaged in the following practices to fix or maintain prices: (1) Fixing minimum prices on new cars, often by

In summary, the FTC found a vertical abuse of power and concluded that franchise agreements needed revision. The dealers' expectations of remedial legislation resulting from the study, however, were dashed by the FTC's criticisms of the dealers' activities. Moreover, as one commentator noted, the FTC's value judgments focused upon the consumer's interests and the absence of deception, fraud, and power. Thus, the interests of dealers and consumers were not necessarily coextensive.[62] Furthermore, it has been postulated that even the FTC's slight criticisms of the manufacturers were based upon the "explicit or implicit assumption that it is against the public interest for the automobile manufacturers to exercise such extensive controls over large numbers of 'independent' businessmen (their dealers)."[63] This "not only begs the crucial question" but also appears contradictory to findings that manufacturer control actually might have been in the public interest.[64]

With the unsatisfactory results of the FTC study behind them, the dealers persuaded Congressman Wright Patman to introduce

means of uniform maximum discounts from the manufacturer resale prices in transactions where no trade-ins are involved; (2) establishing maximum purchase prices, or allowances, for used cars taken in trade; (3) regulating bidding on used cars taken in trade by means of uniform price increases on all bids subsequent to the original bids to be less tban the original bid; and (4) adopting published used-car price guides as a basis for maximum allowances for used cars . . . [and] many local associations operate used-car valuation or appraisal bureaus that are essentially combinations of dealers . . . to restrict competiton in used car trading.

Id. at 1074-75. *See* J. PALAMOUNTAIN, *supra* note 30, at 136-37.

62. J. PALAMOUNTAIN, *supra* note 30, at 138.

63. C. HEWITT, *supra* note 13, at 102-03.

64. *Id.* at 103. As Professor Hewitt states:

On numerous occasions the Commission pointed out various steps (control measures) taken by the manufacturer to both strengthen dealers and to lower the costs of distribution to the consumer. It may be true that the manufacturers have used some of these controls to put an unfair emphasis (from the economic standpoint of the dealer) on volume sales of new cars; but it is also true that many of the controls have resulted in net benefits to both dealers and consumers. The Commission specifically condemned certain practices used by some dealers—*yet the manufacturers (in many cases) have been the major effective force trying to hold these practices to a minimum.*

Id. (emphasis supplied). *See also* text accompanying note 59 *supra*. Furthermore, as one commentator noted, the manufacturer-dealer relationship is perhaps not as one-sided as one might think. For instance, the *mere publicity* of the FTC investigation caused a vast improvement in manufacturer-dealer relations, which suggests the dependence of the manufacturer upon his dealers and his desire not to lose large numbers of them and to increase the valuation of dealer goodwill. The two-sidedness of the power relationship was also shown by the dealers' admission that things were not so bad in spite of specific instances of unreasonableness. The commentator thus concludes that the manufacturer's power actually was limited and had not been generally abused. Instead, it was the mere *existence* of this power and the possibility of abuse that was feared. Applying a rule of reason to this market power, the manufacturer's power does not have undesirable results and actually passes "the performance test with high grades." *See* J. PALAMOUNTAIN, *supra* note 30, at 141-51.

the "Motor Vehicle Act of 1940."[65] The proposed Act provided for FTC regulation of franchise agreements, all of which were required to be of at least three years duration. The bill also placed certain duties upon any manufacturer who opted to exercise control over his dealers.[66] It also sharply curtailed the manufacturer's right of termination.[67]

The bill, however, met with a strange fate. The dealers, who in 1939 had so urgently called for federal legislation, indicated that a decisive majority of their numbers was against it.[68] One commentator speculated that this reaction was due to the FTC's criticism of dealers and the publicity given this fact by opponents of the bill. Furthermore, the bill contained many provisions that regulated dealer practices and dealers feared that this would portend more extensive federal regulation.[69] The bill gave dealers a measure of protection similar to that under many state statutes and broader than later federal legislation. Thus, it is difficult to understand the dealers' position unless they felt that the bill, like the FTC study, regulated manufacturers and dealers in a manner that was fair to *both,* rather than weighted totally in favor of the dealers.

3. The Federal Dealers' Day In Court Act

The movement for federal legislation was revitalized in the 1950's post-war period by the development of a buyer's market and the consequent increase in competition among the dealers. In this environment threats of termination or nonrenewal increased manufacturers' control over dealer policies and quotas, particularly when coupled with the increase in dealers' capital investment. The increased dealer agitation spawned several Congressional investigations,[70] which collectively resulted in the Automobile Dealer's Day

65. *See generally* C. HEWITT, *supra* note 13, at 107-09. For a complete text of the bill, see *id.* at 206.

66. If the manufacturer regulated the dealer's facilities and activities, he would have to agree to purchase all of the dealer's assets on termination. The manufacturer also had to comply with his duty to deliver a certain number of automobiles, had to define "adequately" the duties of its agents, and could not ship except on written order. *Id.* at 108.

67. A franchise agreement could be cancelled only on 180 days' notice *for cause.* These causes had to be enumerated in the franchise agreement and approved by the FTC. Any violation of the Act was the basis for a civil action for treble damages. *Id.* at 108-09. Thus, the Act would have given dealers many of the rights they now enjoy under the state laws. *See* notes 94-195 *infra* and accompanying text.

68. J. PALAMOUNTAIN, *supra* note 30, at 140.

69. *Id. See also* C. HEWITT, *supra* note 13, at 109-10.

70. *E.g., Hearings Before the Subcomm. on Automobile Marketing Practices of the Senate Comm. on Interstate and Foreign Commerce,* 84th Cong., 2d Sess. (1956); *Hearings on Dealer Franchises Before the Antitrust Subcomm. of the House Comm. on the Judiciary,* 84th Cong., 2d Sess., § 26 (1956); *Hearings Before the Subcomm. on Marketing Legislation*

In Court Act.[71]

(a) Scope and Application

The Act provides that an automobile dealer may bring an action for damages and recovery of attorneys' fees when the manufacturer does not use "good faith in performing its obligations under a dealer franchise or in terminating it."[72] The bill's primary purpose was "to correct the abuses of arbitrary termination and nonrenewal."[73] Significantly, the Act does not legislate contract terms; thus, the dealer is not guaranteed a "fair" contract.[74] The Act, however, which covers only *written* franchise agreements,[75] has been interpreted to have some effect upon contract terms. Thus, courts have held that when the manufacturer sets unreasonable or unrealistic sales goals and then selectively terminates dealers for failure to meet these goals, the manufacturer's actions lack good faith and violate the Act.[76]

(b) The Meaning of "Good Faith"

The vital element of the Act is the "good faith" concept. This element was included in the bill specifically to overrule such cases as *Bushwick-Decatur Motors, Inc. v. Ford Motor Co.*,[77] in which the courts had refused to require a duty of good faith on the part of the manufacturer. The Act, in final form[78] defines "good faith"

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of the House Comm. on Interstate and Foreign Commerce, 84th Cong., 2d Sess. (1956); *Hearings on General Motors Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary*, 84th Cong., 1st Sess. (1955). An excellent overview of the entire process of these hearings is given by Professor MacAulay in his landmark law review article, MacAulay, *Changing A Continuing Relationship Between A Large Corporation And Those Who Deal With It: Automobile Manufacturers, Their Dealers, And The Legal System*, 1965 WIS. L. REV. 483, 740, and his book based substantially upon the article, S. MACAULAY, LAW AND THE BALANCE OF POWER—THE AUTOMOBILE MANUFACTURERS AND THEIR DEALERS (1966).

71. 70 Stat. 1125 (1956) (current version at 15 U.S.C. §§ 1221-1225 (1976)).

72. S. REP. No. 2073, 84th Cong., 2d Sess. 1 (1956).

73. *Id.* at 6. The bill was also meant to "supplement the antitrust laws of the United States, in order to balance the power now heavily weighted in favor of automobile manufacturers." *See* H.R. REP. No. 2850, 84th Cong., 2d Sess. 1 (1956).

74. The Act applies "irrespective of contract terms." H.R. REP. No. 2850, 84th Cong., 2d Sess. 6 (1956).

75. *See* 15 U.S.C. § 1221(b) (1976), which defines "franchise" as a "written agreement or contract."

76. *See, e.g.*, Autohaus Brugger, Inc. v. Saab Motors, Inc., 567 F.2d 901, 912 (9th Cir. 1978).

77. 116 F.2d 675 (2d Cir. 1940). *See* S.REP. No. 2073, 84th Cong., 2d Sess. 6 (1956).

78. The definition of good faith as originally drafted required each party to act in a "fair, equitable, and nonarbitrary manner so as to guarantee such other party freedom from coercion, intimidation, or threats of coercion or intimidation, *so as to preserve all equities of such other party which are inherent in the nature of the relationship between such parties*

as "the duty of each party to any franchise . . . to act in a fair and equitable manner toward each other so as to guarantee the one party freedom from coercion, intimidation, or threats of coercion or intimidation from the other party."[79] This provision concerned manufacturers, who expressed the fear that it could be interpreted to prevent manufacturers from cancelling a "nice but inefficient dealer" or that normal persuasive selling methods would be termed "coercion" or "bad faith" under the Act. Therefore, for the sake of neutrality an important proviso, drafted by Ford Motor Company's legal department, was added to the definition of "good faith."[80] That proviso stated: "*Provided,* That recommendation, endorsement, exposition, persuasion, urging or argument shall not be deemed to constitute a lack of good faith."[81]

Much of the argument about the interpretation of "good faith" under the Act has been concerned with whether the statute protects a dealer from any failure to act in a fair and equitable manner or whether it protects him only from coercion or intimidation. Dealers pressed for the former interpretation because it injects personalities and the individual dealer's plight into the equation. Manufacturers, however, wanted decisions to be based on more impersonal factors that were concerned with the business success of *both* the dealer and manufacturer. The courts have generally responded by limiting the Act to situations in which the dealer can show "coercion."[82] "Coercion" includes "forcing" unwanted vehicles and parts, threats of termination, withholding deliveries, and appointment of stimulator dealers.[83]

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by such franchise." H.R. REP. No. 2850, 84th Cong., 2d Sess. 8 (1956) (emphasis supplied). This language caused great consternation to the manufacturers. The balance of power would suddenly have shifted toward the dealers since even a dealer with poor sales might have "equities," whatever these are supposed to be. *See* S. MACAULAY, *supra* note 70, at 61. Arguments were made that such language built "for dealers a sanctuary of competition." *See id.* at 63. Accordingly, the "equities" language was deleted ostensibly to "preclude any interpretation inconsistent with antitrust principles." H.R. REP. No. 2850, 84th Cong., 2d Sess. 8 (1956). This is yet another factor to keep in mind when analyzing the state legislation that uses language strikingly similar to that rejected by Congress. *See* note 130 *infra* and accompanying text.

79. 15 U.S.C. § 1221(e) (1976).

80. *See* S. MACAULAY, *supra* note 70, at 67-69. As Professor MacAulay notes, here the manufacturers won a major victory while the sponsors paid a high price for neutrality.

81. 15 U.S.C. § 1221(e) (1976).

82. *E.g.,* Ed Houser Enterprises v. General Motors Corp., 595 F.2d 366 (7th Cir. 1979); Autohaus Brugger, Inc. v. Saab Motors, Inc., 567 F.2d 901 (9th Cir. 1978); Lawrence Chrysler Plymouth, Inc. v. Chrysler Corp., 461 F.2d 608 (7th Cir.), *cert. denied,* 409 U.S. 981 (1972); Globe Motors, Inc. v. Studebaker-Packard Corp., 328 F.2d 645 (3d Cir. 1964), *cert. denied,* 375 U.S. 896 (1963); Pierce Ford Sales, Inc. v. Ford Motor Co., 299 F.2d 425 (2d Cir.), *cert. denied,* 371 U.S. 829 (1962).

83. *See* Kessler, *supra* note 31, at 1179. Note that these practices are those to which

Thus, through the Act's definition of good faith, the dealer is given much more in the way of protection from the manufacturer's whims than he had under prior case law. The Act prevents the manufacturer from using coercive tactics to injure the dealer. It does not, however, guarantee that the dealer is free from manufacturer actions that are noncoercive, albeit unfair. Although this is undoubtedly disappointing to dealers, one must remember that the purpose of the statute is to *balance* the scales, not to tip them toward the dealer; in this regard the Act seems successful.

(c) The Manufacturer's Defense

Only dealers are authorized to bring suit under the Act.[84] Thus, although both parties are commanded by the Act to deal in good faith, the dealer's lack of good faith is relevant only when raised as a defense by the manufacturer.[85] Apparently, the primary use of this defense would be to defeat an action by a "bootlegging" dealer—one who unloads cars at low prices to the used car dealers.[86] One commentator has suggested that because dealer coercion is rare, the manufacturer's good faith defense should be used to mitigate the dealer's damages rather than as a complete defense.[87] If it is rare, however, perhaps it should be a complete defense, particularly since the manufacturer does not have a cause of action for bad faith under the Act.

One interesting possibility of a defense by the manufacturer concerns the interplay of the Federal Act with the state statutes. For instance, suppose that a manufacturer was being charged what he felt to be unreasonable rates by the dealer for warranty rate reimbursement, over which some states give the dealers total control.[88] The manufacturer terminates the dealer, who then sues under the federal statute, alleging that the manufacturer did not terminate in

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the state statutes are primarily addressed. *See* notes 153-56 *infra* and accompanying text. *See also* S. MACAULAY, *supra* note 70, at 103-35.

84. This disturbed some members of Congress as is evident by the Minority Report's comment that this omission was "contrary to traditional legal concepts." H.R. REP. No. 2850, 84th Cong., 2d Sess. 13 (1956).

85. The defense apparently was added only as an afterthought in order to give the Act the appearance of "mutuality." *See* Comment, *supra* note 40, at 263.

86. 102 CONG. REC. 10571 (1956) ("[A bootleg dealer] would not dare to go into court because such activity on his part would obviously be bad faith"). *See also* 102 CONG. REC. 13116 (1956) (When Senator O'Mahoney was apprised of the House Report's statement that bootlegging could not be used as a defense, he stated that "In a suit by a dealer, a manufacturer should be free by way of defense to introduce . . . evidence of bootlegging by the dealer, if this can be shown to constitute coercion or intimidation or threats of same").

87. *See* Comment, *supra* note 40, at 265.

88. The analysis of these warranty reimbursement rates will be fully developed later in this Note. *See* notes 159-73 *infra* and accompanying text.

good faith. The manufacturer then defends on the basis of the dealer's lack of good faith *in coercing the manufacturer*[89] under the state warranty statute. In situations such as these, there emerges the need for more federal/state coordination, at a minimum.[90]

(d) Summary

The Federal Act thus gives dealers a cause of action to remedy the injustices that allegedly had been heaped upon them by the manufacturers prior to its passage. It allows recovery of damages and costs of a suit if the manufacturer failed to act in "good faith," but allows the manufacturer to raise only the defense of lack of good faith on the part of the dealer. The Act provides a three year statute of limitations[91] and states that no provisions shall repeal, modify, or supersede any provision of the federal antitrust laws.[92] More importantly, at least for purposes of this Note, is section five of the Act, which provides that "[t]his chapter shall not invalidate any provision of the laws of any State except insofar as there is a direct conflict between an express provision of this chapter and an express provision of State law which cannot be reconciled."[93] This provision is the springboard for the extensive state legislation that is the focal point of this Note.

D. State Motor Vehicle Franchise Legislation

Even though the Dealer's Day In Court Act seems to give the dealers ample protection, many dealers, still unsatisfied, successfully turned to the state legislatures for the leverage with which to change manufacturer-dealer relations. Of the fifty states, all but five[94] have legislation that focuses directly upon the automobile manufacturer-dealer relationship. The statutes take varying ap-

89. Although some commentators state that it is unlikely that a dealer will be able to "coerce" a manufacturer, the result under some state statutues is just that—particularly when the dealer unilaterally sets warranty rates and the manufacturer has an appeal on the reasonableness of that rate to a commission that is often composed of automobile *dealers*. *See* notes 115-17 *infra* and accompanying text.

90. In fact, this Note proposes more than merely increased coordination. *See* Part IV *infra*.

91. 15 U.S.C. § 1223 (1976).

92. *Id.* § 1224.

93. *Id.* § 1225.

94. Alaska, Delaware, Missouri, Oregon, and Wyoming. Of these, only Oregon and Wyoming have no franchise statutes whatsoever. *See* Brown & Coben, *supra* note 16, at 22. Both Delaware and Missouri have general franchise statutes that presumably would apply equally to motor vehicle franchises. Alaska, meanwhile, has legislation that deals with petroleum franchises. *Id.*

proaches[95] to the solution of manufacturer-dealer problems, using a variety of provisions, many of which are used by several states.

1. Legislative Findings and Declarations

Many state regulatory schemes begin with a provision setting forth either legislative findings or declarations of public policy.[96] These provisions are included because state legislatures may not use their powers to protect special groups from competition, and legislation that is not "affected with the public interest" is outside the police power of the state.[97] Thus, although legislatures have the "authority under the police power to regulate the purchase and sale of motor vehicles for the protection and general welfare of the public," they may not, "under the guise of regulation,. . . indulge in arbitrary price fixing, the destruction of lawful competition, or the creation of trade restraints tending to establish a monopoly."[98]

The legislatures, in approaching this initial hurdle, have either found or declared that the "distribution and sale"[99] of motor vehicles "vitally affects" the "general economy" of the particular state, the "public interest," or the "public welfare."[100] Some stop there but others add that the legislation is necessary to "avoid undue control of the independent motor vehicle dealer"[101] by the manufacturer, to

95. The statutes generally can be classed as either one of two types: administrative-licensing, or penal. *See* S. MACAULAY, *supra* note 70, at 31-43.

96. *See, e.g.*, ARK. STAT. ANN. § 75-2302 (1979); COLO. REV. STAT. § 12-6-101 (1978); GA. CODE ANN. § 84-6602 (1979); HAWAII REV. STAT. § 437-1 (1976); KY. REV. STAT. § 190.015 (1970); LA. REV. STAT. ANN. § 32:1251 (West 1963); MISS. CODE ANN. § 63-17-53 (1972); NEB. REV. STAT. § 60-1401.01 (1978); N.J. STAT. ANN. § 56:10-2 (West Supp. 1979-1980); N.M. STAT. ANN. § 57-16-1 (1978); N.C. GEN. STAT. § 20-285 (1978); OKLA. STAT. ANN. tit. 47, § 561 (West Supp. 1979-1980); PA. STAT. ANN. tit. 63, § 802 (Purdon Supp. 1979-1980); S.D. CODIFIED LAWS ANN. § 32-6A-1 (1976); TENN. CODE ANN. § 59-1701 (1968); TEX. REV. CIV. STAT. ANN. art. 4413 (36), § 1.02 (Vernon 1976); WASH. REV. CODE ANN. § 46.70.005 (Supp. 1978); W. VA. CODE § 47-17-1 (Supp. 1979).

97. *See* Hood & Sons v. DuMond, 336 U.S. 525, 531 (1949); Buck v. Kuykendall, 267 U.S. 307 (1925).

98. Nelson v. Tilley, 137 Neb. 327, 289 N.W. 388 (1939). *Accord,* Ohio Licensing Bd. v. Memphis Auto Sales, 103 Ohio App. 347, 142 N.E.2d 268 (1957); Joyner v. Centre Motor Co., 192 Va. 627, 66 S.E.2d 469 (1951).

99. Although it may be insignificant, several states do differ in their phraseology. *Cf.* N.C. GEN. STAT. § 20-285 (1978) (only "distribution"); OKLA. STAT. ANN. tit. 47, § 561 (West Supp.1979-1980) ("Distribution and sale of (*new*) motor vehicles") (emphasis added); PA. STAT. ANN. tit. 63, § 802 (Purdon Supp. 1979-1980) (distribution and sales); S.D. CODIFIED LAWS ANN. § 32-6A-1 (1976) ("distribution, sale and servicing"). By contrast, Kentucky's statute is merely to "provide for fair and impartial regulation." KY. REV. STAT. § 190.015 (1970).

100. Although most states adopt these three phrases, at least one provides that it is merely "affected with the public interest." S.D. CODIFIED LAWS ANN. § 32-6A-1 (1976).

101. ARK. STAT. ANN. § 75-2302 (1979); LA. REV. STAT. ANN. § 32:1251 (West 1963); MISS. CODE ANN. § 63-17-53 (1972); W. VA. CODE § 47-17-1 (Supp. 1979). Presumably, it is

assure a "sound system of distribution to the public,"[102] or to assure "compliance with manufacturer's warranties."[103] Three states focus upon disruption of the dealer/customer relationship,[104] while one merely states that it is "necessary to define the relationship and responsibilities of the franchisors and franchisees."[105] Not surprisingly, only one state seems concerned with the dealers' concomitant duties or responsibilities.[106]

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also for the protection of the dealer to "preserve the investments" of the citizens. *See* HAWAII REV. STAT. § 437-1 (1976); OKLA. STAT. ANN. tit. 47, § 561 (West Supp. 1979-1980); PA. STAT. ANN. tit. 63, § 802 (Purdon Supp. 1979-1980); WASH. REV. CODE ANN. § 46.70.005 (Supp. 1978).

102. ARK. STAT. ANN. § 75-2302 (1979); GA. CODE ANN. § 84-6602 (1979); HAWAII REV. STAT. § 437-1 (1976); LA. REV. STAT. ANN. § 32:1251 (West 1963); MISS. CODE ANN. § 63-17-53 (1972); N.M. STAT. ANN. § 57-16-1 (1978); TEX. REV. CIV. STAT. ANN. art. 4413 (36), § 1.02 (Vernon 1976).

103. N.M. STAT. ANN. § 57-16-1 (1978); TEX. REV. CIV. STAT. ANN. art. 4413 (36), § 1.02 (Vernon 1976).

104. *See* COLO. REV. STAT. § 12-6-101 (1978); NEB. REV. STAT. § 60-1401.01 (1978); S.D. CODIFIED LAWS ANN. § 32-6A-1 (1976). These statutes seem to focus on the goodwill or consumer loyalty to a given dealer. In so doing, the South Dakota statute seems somewhat contradictory because it provides that if a franchise is terminated for good cause, the manufacturer must open again in the same area. If this is the case, as long as there remains in the area a franchise for the customers, of what importance is it *to the public* why a particular dealer was terminated? This question is perhaps the most troublesome to proponents of these statutes.

105. N.J. STAT. ANN. § 56:10-2 (West Supp. 1979-1980). At least the New Jersey legislature was consistent in applying its franchise law to *all* franchise relationships with little special treatment for motor vehicles. Many states continue to regulate *only* the motor vehicle franchise even though it would seem that the sale of "2 billion hamburgers" through franchises would also "affect the public interest." *See generally* FRANCHISING, *supra* note 1; Brown & Cohen, *supra* note 16, at 22.

106. W. VA. CODE § 47-17-1 (Supp. 1979) states that one of its purposes is "to insure that dealers fulfill their obligations under their franchises and provide adequate and sufficient service to consumers generally." This one-sidedness in favor of the local dealers could be a statute's undoing. Two principal attacks could he launched. One concerns the due process limitation upon the power of the sovereigu.

> Insofar as this is concerned, [however] the police power is indeed extensive and indefinite in its scope. In particular, it may be exercised to promote the economic welfare of the public (or of a particular group in need of relief from hardship or duress). Thus minimum wage laws and price-fixing legislation are now recoguized as valid from the standpoint of due process.

United States v. Women's Sportswear Ass'n, 336 U.S. 460, 464 (1949). Although this might seem to be a difficult test to meet when challenging motor vehicle franchise legislation, one must ask whether *the public* is actually benefitted by these laws. One court, when recently faced with such a challenge and the legislative declarations of fact and purpose, stated that

> [w]e are not . . . hound by the statements of public purpose found in the acts of the legislature. "We do not think that the recitals contained in the act amount to finding of fact, but are simply arguments presented by the General Assembly as to reasons why they [sic] considered the act necessary, and their conclusions as to the effect of the act." . . . It is the role of the judiciary to decide if the legislature has in fact acted within its power. We conclude here, it has not.

Challenges to legislation usually bypass the argument that a statute is outside the police power of the state because the police power is usually broadly construed. Commentators, however, have long noted that state automobile franchise legislation may actually

General GMC Trucks, Inc. v. General Motors Corp., 239 Ga. 373, 378, 237 S.E.2d 194, 197, *cert. denied,* 434 U.S. 996 (1977).

A second attack can be made that the statutes unreasonably burden interstate commerce. Here the test is somewhat easier to meet since

> a sharp distinction must be drawn when the validity of measures enacted by virtue of the police power is being considered under the commerce clause. For purposes of the commerce clause, genuine health, safety, or other scientifically justifiable regulations are legitimate, and the court will regard their effect upon interstate commerce as remote or incidental. But measures that are only ostensibly related to such objectives, and that really are designed to promote the economic welfare or financial advantage of particular groups or individuals, will be held unconstitutional. This is because such economic legislation in fact amounts to a regulation of commerce, and with respect to interstate commerce the Constitution has conferred upon the federal government, and not the states, the power to make decisions and determine policy with regard to such matters.
>
> If it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze.

United States v. Women's Sportswear Ass'n, 336 U.S. at 464.

Courts have reached conflicting results with regard to this issue. Two courts have ruled that various provisions of state motor vehicle franchise legislation violate the commerce clause. General Motors Corp. v. Blevins, 144 F. Supp. 381, 395 (D. Colo. 1956); General GMC Trucks, Inc. v. General Motors Corp., 239 Ga. 373, 237 S.E.2d 194, *cert. denied,* 434 U.S. 996 (1977). Then in what is probably the "in between" case, a Virginia district court ruled that Virginia's restrictions upon franchise establishment violated the commerce clause, the same finding that the Georgia court reached in *General GMC Trucks. See* American Motors Sales Corp. v. Division of Motor Vehicles, 445 F. Supp. 902 (E.D. Va. 1978), *rev'd,* 592 F.2d 219 (4th Cir. 1979). Aside from the Fourth Circuit's reversal, two other courts have held that a particular state's restriction on franchise establishment did not violate the commerce clause. *See* Chrysler Corp. v. New Motor Vehicle Bd., 89 Cal. App. 3d 1034, 153 Cal. Rptr. 135 (1979); Tober Foreign Motors, Inc. v. Reiter Oldsmobile, Inc., 381 N.E.2d 908 (Mass. 1978). All three latter courts were persuaded that the recent decision in Exxon Corp. v. Governor of Md., 437 U.S. 117 (1978), precluded the commerce clause challenge. *Exxon* upheld a Maryland statute that forbade the major oil companies from owning and operating company-owned service stations.

Several motor vehicle statutes have provisions like the Maryland statute that forbid manufacturers to own or operate auto dealerships under certain circumstances, usually when it would compete with an existing dealer. *See, e.g.,* ME. REV. STAT. ANN. tit. 10, § 1174(3)(K) (Supp. 1979-1980); MASS. GEN. LAWS ANN. ch. 93B, §§ 3, 4(k) (West 1972); NEV. REV. STAT. § 482.36385(1) (1977); N.H. REV. STAT. ANN. § 357-B:4(III)(k) (Supp. 1977); N.C. GEN. STAT. § 20-305.2 (1978); R.I. GEN. LAWS § 31-5.1-4(c)(10) (Supp. 1978); TENN. CODE ANN. § 59-1714(c)(17) (Supp. 1979); VT. STAT. ANN. tit. 9, § 4074(c)(8) (Supp. 1979); VA. CODE § 46.1-547.2 (Supp. 1979). Although *Exxon* may support the validity of these laws, there seems to be a clear distinction between whether a manufacturer can *own* a dealership and whether it can *open* one that will be operated by a local businessman. *Ownership* restrictions such as those upheld in *Exxon* do not burden interstate commerce or stifle competition as do *establishment* restrictions. The latter may also present particular burdens when the establishment has to be justified to a board composed of automobile dealers who may be adverse to the manufacturer's wishes to open a new dealership irrespective of who owns it. For a further discussion of the commerce clause as a viable argument against such legislation, see note 150 *infra* and accompanying text.

not be in the public interest and therefore may be invalid as a mere attempt to protect dealers from competition.[107] Thus, as one recent case makes clear, one should not overlook this possible line of attack.[108]

2. Licensing

One means of controlling the manufacturer-dealer relationship is through a requirement that those engaged in the automobile industry be licensed to do business within the state. These statutes[109] generally follow the pattern of the Wisconsin Act of 1937.[110] Understandably, the primary sanction for wrongful conduct[111] by a manufacturer in these states is revocation, suspension, or denial of his license.[112]

3. Boards and Commissions

The state statutes are administered in a variety of ways. One approach follows that of the early Wisconsin statute[113] and utilizes an "independent" state agency.[114] Several of these, however, use an

107. *See, e.g.*, Brown & Conwill, *Automobile Manufacturer-Dealer Legislation*, 57 COLUM. L. REV. 219, 237 (1957); Kessler, *supra* note 31, at 1189.

108. General GMC Trucks, Inc. v. General Motors Corp., 239 Ga. 373, 237 S.E.2d 194, *cert. denied*, 434 U.S. 996 (1977).

109. ARIZ. REV. STAT. ANN. § 28-1304.01 (1976); ARK. STAT. ANN. § 75-2305(1) (1979); COLO. REV. STAT. §§ 12-6-108, 12-6-115 (1978); CONN. GEN. STAT. ANN. § 14-67a (West Supp. 1979); FLA. STAT. ANN. § 320.61 (West 1975); GA. CODE ANN. § 84-6605 (1979); HAWAII REV. STAT. § 437-2 (1976); IDAHO CODE § 49-2401 (Supp. 1979); ILL. ANN. STAT. ch. 95 ½, §§ 5-101, 5-102 (Smith-Hurd Supp. 1979) (dealers only); IND. CODE ANN. §§ 9-10-2-2, 9-10-2-3 (Burns Supp. 1979) (§ 9-10-2-2 *as amended by* Act of 1979, H. 1769, § 3, 1979 Ind. Legis. Serv. 9 (West)); KAN. STAT. ANN. § 8-2304 (Supp. 1978); KY. REV. STAT. § 190.030 (Supp. 1970); LA. REV. STAT. ANN. § 32:1254(A)(1) (West 1963); MD. TRANSP. CODE ANN. § 15-202 (1977); MISS. CODE ANN. § 63-17-73 (1972); MONT. REV. CODES ANN. § 51-602 (Supp. 1977); NEB. REV. STAT. § 60-1403.01 (1978); N.Y. GEN. BUS. LAW § 196 (McKinney 1968); N.C. GEN. STAT. § 20-287 (1978); OHIO REV. CODE ANN. § 4517.02-.20, .99 (Page Supp. 1978); OKLA. STAT. ANN. tit. 47, § 564 (West Supp. 1979-1980); PA. STAT. ANN. tit. 63, § 804 (Purdon Supp. 1979-1980); R.I. GEN. LAWS § 31-5-21 (1968); TENN. CODE ANN. § 59-1709 (Supp. 1979); TEX. REV. CIV. STAT. ANN. art. 4413 (36), § 4.01-.07 (Vernon Supp. 1980); UTAH CODE ANN. § 41-3-6 (1953); VA. CODE § 46.1-523 (Supp. 1979); WASH. REV. CODE ANN. § 46.70.021 (Supp. 1978); WIS. STAT. ANN. § 218.01 (1b) (West Supp. 1979-1980). Some states purport to have some form of "merit" regulation and require the manufacturer to file a copy of its standard franchise agreement with a state authority. *See, e.g.*, CONN. GEN. STAT. ANN. § 14-67a (West Supp. 1979); IND. CODE ANN. § 9-10-2-3 (Burns Supp. 1979); MONT. REV. CODES ANN. § 51-604 (Supp. 1977).

110. *See* note 199 *supra*; S. MACAULAY, *supra* note 70, at 31-34.

111. Wrongful conduct includes wrongful termination, coercion, failure to deliver automobiles, price discrimination among dealers, and failure to pay warranty claims.

112. *See* notes 174-77 *infra* and accompanying text.

113. 1937 Wis. Laws, ch. 377, at 602, ch. 378, at 603, ch. 417, at 588, *presently codified as* WIS. STAT. ANN. § 218.01 (West Supp. 1979-1980). *See* S. MACAULAY, *supra* note 70, at 31-32.

114. *Cf.* ARIZ. REV. STAT. ANN. § 28-1303 (1976) (assistant director of motor vehicles);

"advisory board," usually made up of members of the industry, primarily dealers.[115] Others, expanding on the "advisory board" theme, administer the statutes through a commission, often appointed by some executive officer, that is composed of members of the industry, usually dealers. This latter type statute may actually mandate the presence of dealers[116] or may be neutrally worded.[117]

COLO. REV. STAT. § 12-6-105 (1978) (executive director of the department of revenue administers licensing of manufacturers); CONN. GEN. STAT. ANN. § 14-67a (West Supp. 1979) (commissioner of motor vehicles); FLA. STAT. ANN. §§ 320.60-.70 (West 1975) (repealed by 1976 Fla. Laws ch. 76-168, § 3 eff. July 1, 1980) (department of highway safety and motor vehicles); IDAHO CODE § 49-2403 (Supp. 1979) (director of department of law enforcement—however, decisions are made jointly by the director *and* the advisory board, *id.* § 49-2417); IND. CODE ANN. § 9-10-2-1 (Burns Supp. 1979) (commissioner of motor vehicles); IOWA CODE ANN. § 322A.6 (West Supp. 1979-1980) (transportation regulation board); KAN. STAT. ANN. § 8-2303 (1975) (director of vehicles—however, decisions may be set aside by dealer review board, *id.* § 8-2310(b)); KY. REV. STAT. §§ 190.020, 190.067 (1970) (bureau of vehicle regulation is enforcement agency of the board, but board has no authority over manufacturers, *id.* § 190.041 (Supp. 1978)); MD. TRANSP. CODE ANN. §§ 12-101 to -119 (1977) (motor vehicle administration); MONT. REV. CODES ANN. § 51-603 (Supp. 1977) (department of business regulation); N.C. GEN. STAT. §§ 20-288, 20-301, 20-302 (1978) (commissioner of motor vehicles); R.I. GEN. LAWS §§ 31-5-1 to -12 (Supp. 1978) (registrar of motor vehicles); S.D. CODIFIED LAWS ANN. § 32-6A-9 (1976) (department of public safety); UTAH CODE ANN. § 41-3-8 (1953) (motor vehicle business administrator); VA. CODE §§ 46.1-517 to -550.3 (1974) (commissioner); WIS. STAT. ANN. § 218-01(1a) (West Supp. 1979-1980) (state motor vehicle department).

115. *Cf.* FLA. STAT. ANN. § 320.694 (West 1975) (repealed eff. July 1, 1980) (3 dealers, 1 manufacturer, 2 "consumer" members, and the director of motor vehicles); IDAHO CODE § 49-2404 (Supp. 1979) (5 dealers); IND. CODE ANN. §§ 9-10-4-1 to -3 (Burns Supp. 1979) (2 dealers, 2 manufacturer representatives, 2 "consumer" members); KAN. STAT. ANN. § 8-2311 (1975) (4 dealers, 1 manufacturer representative, and 2 "consumer" members); N.C. GEN. STAT. § 20-305.4 (1978) (3 dealers and 3 "consumer" members); UTAH CODE ANN. § 41-3-9 (1953) (5 members from the industry); VA. CODE § 46.1-550.2 (Supp. 1979) (3 dealers and 3 "nondealers"); WIS. STAT. ANN. § 218.01(4) (1957) (9 members—no mandated composition).

116. The primary thesis of this Note is that these boards deny manufacturers an impartial tribunal in violation of the fifth and fourteenth amendments to the United States Constitution. Many of these statutes also mandate the presence of "consumer" members—those not associated with any facet of the industry. *Cf.* CAL. VEH. CODE §§ 3000, 3001 (West Supp. 1979) (4 dealers, 5 "consumer" members); COLO. REV. STAT. § 12-6-103 (1978) (7 dealers, 2 "consumer" members—only administer dealer licensing); GA. CODE ANN. § 84-6604 (1979) (5 dealers, 4 nondealers); KY. REV. STAT. § 190.061 (1970) (commissioner and 8 dealers—no control over manufacturers); NEB. REV. STAT. § 60-1402 (1978) (director of motor vehicles, 5 auto dealers, 1 truck dealer, 1 motorcycle dealer, 1 factory representative, and 1 "consumer" member); OHIO REV. CODE ANN. § 4517.30 (Page Supp. 1978) (registrar of motor vehicles, 5 dealers, 2 lessors, 1 "consumer" member); PA. STAT. ANN. tit. 63, § 803 (Purdon Supp. 1979-1980) (6 dealers, 1 salesman, 3 "consumer" members); R.I. GEN. LAWS § 31-5-2 (1968) (7 dealers, 2 "consumer" members); TEX. REV. CIV. STAT. ANN. art. 4413(36), §§ 2.01-.10 (Vernon Supp. 1980) (5 dealers, 4 "consumer" members).

117. *Cf.* ARK. STAT. ANN. § 75-2304 (1979) (5 "licensees," 2 "consumer" members); HAWAII REV. STAT. § 437-5 (1976) (3 shall be engaged in the motor vehicle industry and 4 shall be private citizens not connected with the industry); LA. REV. STAT. ANN. § 32:1253 (West 1963 & Supp. 1979) (9 members who shall be "actually engaged in the manufacture, distribution or sale of motor vehicles in the state . . . for . . . five . . . years"); MISS. CODE ANN. §§ 63-17-57, 63-17-59 (1972) (6 "licensees," 2 "consumer" members); OKLA. STAT. ANN. tit. 47, § 563 (West Supp. 1979-1980) (7 members who shall be engaged in the manufacture, distri-

Rarely, however, is there the mandated presence of a manufacturer,[118] and manufacturers generally receive little consideration for membership on these agencies.[119] Meanwhile, the statutes that may be classified as primarily "penal" generally leave enforcement of the statutes to local law enforcement agencies and the courts, using fines rather than licensing as the primary sanction.[120]

4. Restrictions on Franchise Termination

Perhaps the most salient feature of the state legislation is its attempt to restrict the termination of the relationship between the manufacturer and the dealer.[121] In this area, the states enunciate the restriction in one of two ways. Several states totally forbid termination by the manufacturer[122] unless the applicable standard[123] is met.

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bution, or sale of motor vehicles within the state for not less than 10 years); TENN. CODE ANN. § 59-1703 (Supp. 1979) (9 members who "shall have been actually engaged in the manufacture, distribution, or sale of motor vehicles in this state for not less than five (5) . . . years and 2 'consumer' members").

118. Only Nehraska requires representation of the manufacturer or "factory." *See* NEB. REV. STAT. § 60-1402 (1978) (one out of nine board members.)

119. Even with the statutes with a "neutral" wording, see note 117 *supra*, "[i]n effect, a group of established automobile dealers sits in judgment on other dealers and on manufacturers and their representatives rather than an independent state agency. . . . Clearly, [these] Commission[s] will have a certain type of expertise." S. MACAULAY, *supra* note 70, at 33. Professor MacAulay's statement is certainly correct. For example, the Tennessee statute requires the board to be composed of those engaged in "manufacture, distribution, or sale" of automobiles as well as two "consumer" members, but the Tennessee Motor Vehicle Commission is composed of two "consumer" members and *nine automobile dealers* as of the date of this Note.

120. MASS. GEN. LAWS ANN. ch. 93B, § 2 (West 1972); MICH. COMP. LAWS ANN. §§ 445.521-.534 (Supp. 1979-1980); MINN. STAT. ANN. §§ 325.15-.24 (West 1966); NEV. REV. STAT. § 482.36411 (1977); N.H. REV. STAT. ANN. § 357-B:16 (Supp. 1977); N.J. STAT. ANN. § 56:10-10 (West Supp. 1979-1980); N.M. STAT. ANN. § 57-16-13 (1978); N.Y. GEN. BUS. LAW § 198 (McKinney Supp. 1979-1980); N.D. CENT. CODE § 51-07-01.1 (Supp. 1979); S.C. CODE § 56-15-20 (1976); VT. STAT. ANN. tit. 9, § 4072 (Supp. 1979); WASH. REV. CODE ANN. § 46-70.190 (Supp. 1978); W. VA. CODE §§ 47-17-3, 47-17-6 (SUPP. 1979).

121. In fact, this is listed as one of the "public purposes" for much of the state legislation. *See* notes 101-04 *supra* and accompanying text.

122. ARIZ. REV. STAT. ANN. § 28-1304.02 (Supp. 1979-1980); ARK. STAT. ANN. § 75-2305(A)(4)(c) (1979); CAL. VEH. CODE § 3060 (West Supp. 1979); COLO. REV. STAT. § 12-6-120 (1)(d) (1978); IDAHO CODE § 49-2414(7)(f) (Supp. 1979); IND. CODE ANN. § 9-10-3-5 (Burns Supp. 1979); IOWA CODE ANN. § 322A.2 (West Supp. 1979-1980); LA. REV. STAT. ANN. § 32:1254(A)(4)(c) (West Supp. 1979); ME. REV. STAT. ANN. tit. 10, § 1174(3)(C), 1179 (Supp. 1979-1980); MD. TRANSP. CODE ANN. § 15-209 (1977); MASS. GEN. LAWS ANN. ch. 93B, § 4(3)(e) (West Supp. 1979); MICH. COMP. LAWS ANN. § 445.522 (Supp. 1979-1980); MISS. CODE ANN. § 63-17-73(1)(d)(3) (1972); MONT. REV. CODES ANN. § 51-605(1) (Supp. 1977); NEB. REV. STAT. § 60-1420 (1978); NEV. REV. STAT. § 482.3636 (1977); N.H. REV. STAT. ANN. §§ 357-B:4 (III) (c), 357-B:9 (Supp. 1977); N.J. STAT. ANN. § 56:10-5 (West Supp. 1979-1980); N.M. STAT. ANN. §§ 57-16-5(F), 57-16-9 (1978); N.Y. GEN. BUS. LAW §§ 197, 197-a (McKinney Supp. 1979-1980); N.C. GEN. STAT. § 20-305(6) (1978); N.D. CENT. CODE § 51-07-01.1 (Supp. 1979); OKLA. STAT. ANN. tit. 47, § 565(j)(4) (West Supp. 1979-1980); S.C. CODE 56-15-40(3)(c) (1976); S.D.

Others use wrongful termination as grounds for revocation or suspension of the manufacturer's license.[124]

The standards for termination vary widely among the states. The more commonly used standard prevents the manufacturer from terminating a franchise except for "cause,"[125] which may be expressed as "good" cause,[126] "due" cause,[127] or "just" cause.[128] Others, following the example of the federal statute, use "good faith."[129] Meanwhile, several states employ an amorphous standard that prohibits a manufacturer from cancelling a franchise "unfairly, without due regard to the equities of said dealer and without just provocation."[130] A small number of states either specifically enumerate what

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CODIFIED LAWS ANN. § 32-6A-5 (1976); TEX. REV. CIV. STAT. ANN. art. 4413(36), § 5.02(3) (Vernon Supp. 1980); UTAH CODE ANN. § 41-3-23(C)(6) (1953); VT. STAT. ANN. tit. 9, §§ 4074(C)(3), 4079 (Supp. 1979); VA. CODE § 46.1-547(e) (Supp. 1979); WASH. REV. CODE ANN. § 46.70.180(10)(b) (Supp. 1978); W. VA. CODE § 47-17-5(a) (Supp. 1979); WIS. STAT. ANN. § 218.01(3)(a)(17) (West Supp. 1979-1980).

123. *See* notes 125-32 *infra* and accompanying text.

124. Several of the statutes cited in note 122 *supra* are examples of "unfair" or "prohibited" practices that are grounds for revocation of licenses. The following statutes, however, specifically classify wrongful termination as a ground for revocation or suspension of a license. *See* FLA. STAT. ANN. § 320.64(8) (West 1975)(repealed eff. July 1, 1980); GA. CODE ANN. §§ 84-6610(C)(1)-(3) (Supp. 1979); HAWAII REV. STAT. § 437-28(b)(22)(C) (1976); KAN. STAT. ANN. § 8-2308(a)(13)(ii) (1975); KY. REV. STAT. § 190.040(1)(o) (Supp. 1970); PA. STAT. ANN. tit. 63, § 805(2)(xi) (Purdon Supp. 1979-1980); R.I. GEN. LAWS § 31-5-23(8) (1968); TENN. CODE ANN. § 59-1714(c)(3) (Supp. 1979).

125. MONT. REV. CODES ANN. § 51-605(1) (Supp. 1977); N.Y. GEN. BUS. LAW. § 197 (McKinney Supp. 1979-1980).

126. ARIZ. REV. STAT. ANN. § 28-1304.02 (Supp. 1979-1980); CAL. VEH. CODE § 3060 (West Supp. 1979); GA. CODE ANN. §§ 84-6610(C)(1)-(3) (Supp. 1979); IOWA CODE ANN. § 322A.2 (West Supp. 1979-1980); MASS. GEN. LAWS ANN. ch. 93B, § 4(3)(e) (West Supp. 1979); MICH. COMP. LAWS ANN. § 445.522 (Supp. 1979-1980); NEB. REV. STAT. § 60-1420 (1978); NEV. REV. STAT. § 482.3636 (1977); N.J. STAT. ANN. § 56:10-5 (West Supp. 1979-1980); N.C. GEN. STAT. § 20-305(6) (1978); N.D. CENT. CODE § 51-07-01.1 (Supp. 1979); S.D. CODIFIED LAWS ANN. § 32-6A-5 (1976); TEX. REV. CIV. STAT. ANN. art. 4413(36), § 5.02(3) (Vernon Supp. 1980); VA. CODE § 46.1-547(e) (Supp. 1979).

127. ARK. STAT. ANN. § 75-2305(a)(4)(c) (1979); ME. REV. STAT. ANN. tit. 10, §§ 1174(3)(c), 1179 (Supp. 1979-1980); MISS. CODE ANN. § 63-17-73(1)(d)(3) (1972); N.H. REV. STAT. ANN. §§ 357-B:4(III)(c), 357-B:9 (Supp. 1977); N.M. STAT. ANN. § 57-16-5(F) (1978); S.C. CODE § 56-15-40(3)(c) (1976); VT. STAT. ANN. tit. 9, §§ 4074(c)(3), 4079 (Supp. 1979).

128. COLO. REV. STAT. § 12-6-120(1)(d) (1978); W. VA. CODE § 47-17-5(a) (Supp. 1979).

129. *See* Automobile Dealers' Day in Court Act, 15 U.S.C. §§ 1221-1225 (1976), discussed in notes 70-93 *supra* and accompanying text; HAWAII REV. STAT. § 437-28(b)(22)(C) (1976); N.Y. GEN. BUS. LAW § 197-a (McKinney Supp. 1979-1980) (after Sept. 1, 1970); WASH. REV. CODE ANN. § 46.70.180(10)(b) (Supp. 1978).

130. *See* FLA. STAT. ANN. § 320.64(8) (West 1975)(repealed eff. July 1, 1980); IDAHO CODE § 49-2414(7)(f) (Supp. 1979); KAN. STAT. ANN. § 8-2308(a)(13)(ii) (1975); KY. REV. STAT. § 190.040(1)(o) (Supp. 1978); LA. REV. STAT. ANN. § 32:1254(a)(4)(c) (West Supp. 1979); OKLA. STAT. ANN. tit. 47, § 565(j)(4) (West Supp. 1979-1980); PA. STAT. ANN. tit. 63, § 805(2)(xi) (Purdon Supp. 1979-1980); R.I. GEN. LAWS § 31-5-23(8) (1968); TENN. CODE ANN. § 59-1714(c)(3) (Supp. 1979); UTAH CODE ANN. § 41-3-23(c)(6) (1953); WIS. STAT. ANN. § 218.01(3)(a)(17) (West Supp. 1979-1980). For problems in the use of this standard, see note

they consider to be more objective standards[131] or further blur the standard with a mixture of terms.[132]

Some legislatures, apparently realizing the problems[133] inherent in their standard, enumerate factors to be considered when determining whether the state's particular standard for termination is met.[134] Some also specify factors that do *not* satisfy that state's

133 *infra*. Also, recall that Congress rejected similar language in drafting the Automobile Dealers' Day In Court Act. *See* note 78 *supra*.

131. *Cf.* MD. TRANSP. CODE ANN. § 15-209 (1977) (Dealer must fail to substantially comply with the reasonable requirements of the franchise); MICH. COMP. LAWS ANN. § 445.522 (Supp. 1979-1980) (must "act with good cause and in accordance with reasonable standards of fair dealing"); N.J. STAT. ANN. § 56:10-5 (West Supp. 1979-1980) ("good cause" is limited to one situation—failure to substantially comply with the requirements of the franchise); N.D. CENT. CODE § 51-07-01.1 (Supp. 1979) ("good cause" is again limited to one situation—failure to comply with the requirements of the franchise); WASH. REV. CODE ANN. § 46.70.180(10)(b) (Supp. 1978) (must "fairly compensate the dealer at fair going business value").

132. Idaho, for example, employs the "unfairly without due regard" standard, see note 130 *supra* and accompanying text, yet enumerates factors to determine whether "good cause" is established. IDAHO CODE § 49-2414(7)(f) (Supp. 1979). *Cf.* N.D. CENT. CODE § 51-07-01.1 (Supp. 1979) (determination of "good cause" must be made in "good faith"); OKLA. STAT. ANN. tit. 47, § 565(j)(4) (West Supp. 1979-1980) ("unfairly and without just provocation *or* without due regard to the equities of the dealer *or* without good faith") (emphasis added); WASH. REV. CODE ANN. § 46.70.180(10)(b) (Supp. 1978) ("without fairly compensating the dealer at fair going business value" if the termination was not in "good faith").

133. This legislation, commonly referred to as "good cause" legislation, is subject to a host of constitutional challenges, including arguments that it is "vague and uncertain," that it violates the commerce and due process clauses, and that it is preempted through operation of the supremacy clause. Although these particular challenges are beyond the scope of this Note, a litigator in this area could and should argue many of these concepts. *See, e.g.*, Brown & Cohen, *supra* note 16; Brown & Conwill, *supra* note 107; Kessler, *supra* note 31; Note, *Constitutional Obstacles to State "Good Cause" Restrictions On Franchise Terminations*, 74 COLUM. L. REV. 1487 (1974); Comment, *Public Interest and the Iowa Motor Vehicle Franchisers Act*, 56 IOWA L. REV. 1060 (1971); Comment, *The Automobile Dealer Franchise Act of 1956—An Evaluation*, 48 CORNELL L.Q. 711 (1963); Comment, *The Judicial Treatment of the Automobile Dealer Franchise Act*, 62 MICH. L. REV. 310 (1963); Comment, *supra* note 40.

134. These factors include such things as the amount of the business transacted by the franchisee, the investment necessarily made, obligations incurred by the franchisee in the performance of his part of the franchise, the permanency of the investment, whether termination is injurious to the public welfare, the franchisee's ability to serve customers, whether the franchisee has refused to honor the franchisor's warranties, whether the franchisee has failed to substantially comply with the terms of the franchise, and whether there has been bad faith on the part of the franchisee. *See* ARIZ. REV. STAT. ANN. § 28-1304.02 (Supp. 1979-1980); CAL. VEH. CODE § 3061 (West Supp. 1979); GA. CODE ANN. § 84-6610(c)(4) (Supp. 1979); IDAHO CODE § 49-2414(7)(f) (Supp. 1979); IOWA CODE ANN. § 322A.15 (West Supp. 1979-1980); MASS. GEN. LAWS ANN. ch. 93B, § 4(3)(e) (West Supp. 1979); MONT. REV. CODES ANN. § 51-605(15) (Supp. 1977); NEB. REV. STAT. § 60-1433 (1978); NEV. REV. STAT. § 482.3636 (1977); S.D. CODIFIED LAWS ANN. § 32-6A-6 (1976). Michigan has a more exhaustive list that is more manufacturer-oriented. It includes such factors as whether the dealer has made a material misrepresentation to the manufacturer or whether the dealer has been convicted of a crime. MICH. COMP. LAWS ANN. § 445.522 (Supp. 1979-1980).

standard[135] for termination.[136]

5. Restrictions on Franchise Establishment

Many states, in what is sometimes an open admission of an underlying rationale of economic protectionism,[137] regulate the establishment as well as the termination of franchises. As with franchise termination, states utilize a variety of standards including "good" cause,[138] "in the public interest,"[139] or for "public convenience and necessity."[140] Others focus upon such items as "the relevant market area," the "adequacy of service of existing dealers," and the "propriety of granting additional franchises."[141] Still other states, without attempting to hide their protectionist motives, ask whether the establishment of a new dealership "would be inequitable to the existing dealer."[142] Several states also enumerate factors

135. Factors that do not meet the requisite standard typically include a mere change in ownership of the dealership and a dealer's refusal of any vehicle or part not orderd by the dealer. *See* ARIZ. REV. STAT. ANN. § 28-1304.02 (Supp. 1979-1980); IOWA CODE ANN. § 322A.11 (West Supp. 1979-1980); NEB. REV. STAT. § 60-1429 (1978); S.D. CODIFIED LAWS ANN. § 32-6A-5 (1976).

136. Do state termination provisions that require a manufacturer to show good cause, due cause, etc., directly conflict with the Federal Act that requires only good faith and are they therefore preempted under 15 U.S.C. § 1225 (1976)? *See* note 93 *supra* and accompanying text. Are they preempted under the antitrust laws or under the commerce clause? *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 376-84 (1978); Brown & Cohen, *supra* note 16, at 44-51, 56-58; Note, *supra* note 133, at 1499-1506.

137. *See* note 142 *infra* and accompanying text.

138. ARIZ. REV. STAT. ANN. § 28-1304.02 (Supp. 1979-1980); CAL. VEH. CODE § 3062 (West Supp. 1979); GA. CODE ANN. § 84-6610(C)(5) (Supp. 1979); IOWA CODE ANN. § 322A.4 (West Supp. 1979-1980); MONT. REV. CODES ANN. § 51-605(2) (Supp. 1977); NEB. REV. STAT. § 60-1422 (1978); NEV. REV. STAT. § 482.36365 (1977); TEX. REV. CIV. STAT. ANN. art. 4413(36), § 4.06(c) (Vernon Supp. 1980).

139. These two statutes, however, also require "good cause." *See* MONT. REV. CODES ANN. § 51-605(2) (Supp. 1977); TEX. REV. CIV. STAT. ANN. art. 4413(36), § 4.06(c) (Vernon Supp. 1980).

140. S.D. CODIFIED LAWS ANN. § 32-6A-3 (1976). South Dakota, however, enumerates factors that eitber do or do not establish "good cause." *See id.* § 32-6A-4.

141. N.H. REV. STAT. ANN. § 357-B:4 (III) (1) (Supp. 1977) (with the relevant market area to be determined solely by "equitable principles"); R.I. GEN. LAWS § 31-5.1-4(C)(11) (Supp. 1978) (also with reference to "equitable principles"); TENN. CODE ANN. § 59-1714(c) (20) (Supp. 1979); VT. STAT. ANN. tit. 9, § 4074(c)(8), (9) (Supp. 1979).

142. These statues, however, graciously provide that "the sales and needs of tbe public shall be given *due consideration.*" (emphasis added). If the legislation is truly in the public interest, should this not be the *primary* consideration? *See* note 106 *supra;* COLO. REV. STAT. § 12-6-120(1)(h) (1978); N.M. STAT. ANN. § 57-16-5(p) (1978). *Cf.* TEX. REV. CIV. STAT. ANN. art. 4413(36), § 4.06(c) (Vernon Supp. 1980) (In determining "good cause" and "public interest," the Commission shall consider the desirability of a competitive market place). *See also* FLA. STAT. ANN. § 320.64(9) (West 1975) (repealed eff. July 1, 1980) (cannot enter agreement with franchisee with inadequate facilities); MASS. GEN. LAWS ANN. ch. 93B, § 4(3) (1) (West Supp. 1979) (may not be "arbitrary" or without notice to existing franchisees); N.C. GEN. STAT. § 20-305(5) (1978) (a new franchise will not be permitted if there is "reasonable

that are considered grounds for establishment of new franchises, as well as those that are not.[143]

The United States Supreme Court considered the validity of restrictions upon motor vehicle franchise establishment in *New Motor Vehicle Board v. Orrin W. Fox Co.*[144] The manufacturer challenged the constitutionality of a California statute that required the manufacturer to secure the approval of the Board before opening a new franchise within the market area of an existing dealer. Such approval was not required, however, if the existing dealer did not protest. A federal district court declared the statute unconstitutional.[145]

The Supreme Court reversed in an opinion by Justice Brennan. The Court, assuming a protected interest,[146] first held that the stat-

evidence that . . . the market will not support all of the dealerships . . . in the trade area"); VA. CODE § 46.1-547(d) (Supp. 1979) (same as North Carolina).

143. Among those factors are the amount of business conducted by other franchisees of the same line-make in the community, the investment necessarily made and the obligations incurred by other franchisees in the area in performing their franchises, whether other franchises are providing adequate service, the permanency of the investment, the effect upon the motor vehicle business and the consuming public in the relevant market area, whether it would be injurious to public welfare, and whether it would increase competition and therefore be in the public interest. *See* ARIZ. REV. STAT. ANN. § 28-1304.02 (Supp. 1979-1980); CAL. VEH. CODE § 3063 (West Supp. 1979); GA. CODE ANN. § 84-6610(c)(5)(F) (Supp. 1979); IOWA CODE ANN. § 322A.16 (West Supp. 1979-1980); MASS. GEN. LAWS ANN. ch. 93B, § 4(3)(*l*) (West Supp. 1979); MONT. REV. CODES ANN. § 51-605(16) (Supp. 1977); NEB. REV. STAT. § 60-1434 (1978); NEV. REV. STAT. § 482.36365 (1977); S.D. CODIFIED LAWS ANN. § 32-6A-4 (1976). Interestingly, the Nevada statute is the only one that states explicitly what should he the real purpose of these laws—to prevent coercion by the manufacturer, for which the dealer could sue under the Federal Good Faith Act. *Cf.* H.R. REP. No. 2850, 84th Cong., 2d Sess. 9 (1956) ("would not prohibit a manufacturer from appointing an additional dealer in a community *provided that the establishment of the new dealer is not a device to coerce or intimadate an existing dealer*") (emphasis added). Three states also list factors that do not constitute grounds for the establishment of a new dealership including the mere desire for further market penetration, a change in ownership of an existing franchisee, and non-acceptance by existing dealers of unordered parts or vehicles. *See* IOWA CODE ANN. §§ 322A.11 (West Supp. 1979-1980); N.M. STAT. ANN. § 57-16-5(p) (1978); S.D. CODIFIED LAWS ANN. § 32-6A-7 (1976).

144. 439 U.S. 96 (1978).

145. The California act was declared unconstitutional by a three judge district court, which held that the absence of a prior hearing on the merits of a protest prior to sending notification to the manufacturer denied manufacturers and their proposed franchisees the procedural due process mandated by the fourteenth amendment. Orrin W. Fox Co. v. New Motor Vehicle Bd., 440 F. Supp. 436 (C.D. Cal. 1977), *rev'd,* 439 U.S. 96 (1978).

146. There was disagreement among the court concerning whether there actually was a "liberty" interest. Two of tbe concurring justices did not find a liberty interest, viewing the case as one of *substantive* due process. Thus, they disposed of it under the general "hands off" approach to economic legislation exemplified by Ferguson v. Skrupa, 372 U.S. 726 (1963). 439 U.S. at 114 (Blackmun, J., concurring). If this is the proper approach (and this author believes tbat it is) what would have been the Court's reaction to the same procedure had the California system been overseen by a board of automobile dealers? Would this have then denied the manufacturers substantive due process? California had only shortly beforehand struck down the composition of its all-dealer board as violative of due process

ute did not deny the manufacturer due process of law because such interests may always be subject to reasonable restrictions imposed by a "general scheme of business regulation."[147] The Court then[148] rejected the claims that the statute conflicted with the Sherman Act, holding that it fell within the "state action" exception.[149] Curiously absent from the Court's opinion, however, was any mention of whether the statute burdened interstate commerce. With three cases recently reaching conflicting results on this issue,[150] it appears that the commerce clause may be one of the few remaining viable challenges[151] to provisions that restrict franchise establishment after *Orrin W. Fox.*

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in American Motors Sales Corp. v. New Motor Vehicle Bd., 69 Cal. App. 3d 983, 138 Cal. Rptr. 594 (1977). *See* notes 253-61 *infra* and accompanying text.

147. 439 U.S. at 106.

148. Before reaching the antitrust issues, the Court quickly disposed of the argument that the act impermissibly delegated state power to private citizens, stating that "[a]n otherwise valid regulation is not rendered invalid simply because those whom the regulation is desigued to safeguard may elect to forego its protection." *Id.* at 108-09. What result when the private citizens actually control the system through delegation of power? For a discussion of the delegation doctrine as it pertains to statutes "regulating" warranty rate reimbursement, see note 169 *infra.*

149. 439 U.S. at 109-11. *See, e.g.,* City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389 (1978); Bates v. State Bar, 433 U.S. 350 (1977); Parker v. Brown, 317 U.S. 341 (1943). Inherent in the *Parker* doctrine, however, is the distinction between a state statute that is merely permissive of private anticompetitive conduct and one that actually substitutes a policy of governmental regulation for the free market policies of the federal antitrust laws. The former would be preempted by the Sherman Act's prohibition of private anticompetitive behavior. Thus, states are not free to merely authorize anticompetitive conduct or to disregard the antitrust laws in pursuit of purely commercial objectives. *See generally* Davidson & Butters, Parker *and* Usery: *Portended Constitutional Limits on the Federal Interdiction of Anticompetitive State Action,* 31 VAND. L. REV. 575 (1978). *See also* L. TRIBE, *supra* note 136, at 30-31 (Supp. 1979) (suggesting an erosion of the *Parker* rationale). Recall these basics during the discussion of warranty rate reimbursement at text accompanying notes 159-173 *infra.* Also, if a state board is composed of automobile dealers who make decisions on establishment, could there not be a possible antitrust violation? *See* Schwegmann Bros. v. Calvert Distilleries, 341 U.S. 384 (1951). *Cf.* California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1972) (suggesting that dealers who pressed sham protests for the sole reason of delaying the establishment of competing dealerships may be vulnerable to suits under the antitrust laws).

150. *Compare* Chrysler Corp. v. New Motor Vehicle Bd., 89 Cal. App. 3d 1034, 153 Cal. Rptr. 135 (1979) *and* Tober Foreigu Motors, Inc. v. Reiter Oldsmobile, Inc., 381 N.E.2d 908 (Mass. 1978) *with* American Motors Sales Corp. v. Division of Motor Vehicles, 445 F. Supp. 902 (E.D. Va. 1978), *rev'd,* 592 F.2d 219 (4th Cir. 1979) *and* General GMC Trucks, Inc. v. General Motors Corp., 239 Ga. 373, 237 S.E.2d 194, *cert. denied,* 434 U.S. 996 (1977).

151. For a partial discussion of the commerce clause challenge, see note 106 *supra* which notes that several recent cases view the Court's decision in *Exxon Corp. v. Governor of Md.* as controlling on this issue. Upholding Maryland's prohibition against oil companies' ownership of service stations, the *Exxon* court stated:

> [W]e do not find that the Commerce Clause, *by its own force,* pre-empts the field. . . . [T]he Commerce Clause *itself* pre-empts an entire field from state regulation, and then only when a lack of national uniformity would impede the flow of interstate goods.

6. Prohibitions on Coercion and Price Discrimination

It is undoubtedly clear at this point that a central concern for dealers has always been a fear of coercion by the manufacturer, which can take a variety of forms. Traditionally, a major topic has been the "forcing" of unordered vehicles and parts upon the dealers. Often accompanying such practices were threats of termination, failure to deliver promptly or in proper quantity the automobiles that the dealer actually did order, and threats to open "stimulator" dealers.

Although these practices are substantially covered by the Fed-

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[citations omitted] The evil [here] is not that the several States will enact differing regulations, but rather that they will all conclude that divestiture provisions are warranted. The problem thus is not one of national uniformity. In the absence of a relevant congressional declaration of policy, or a showing of a specific discrimination against, or burdening of, interstate commerce, we cannot conclude that the States are without power to regulate in this area.

437 U.S. at 128-29 (emphasis added). Does this remark apply equally to automobile franchise establishment? As the House report on the Dealer's Day In Court Act emphasized:

the bill does not afford the dealer the right to be free from competition from additional franchise dealers. *Appointment of added dealers in an area is a normal competitive method for securing better distribution and curtailment of this right would be inconsistent with the antitrust objectives of this legislation.*

H.R. REP. No. 2850, 84th Cong., 2d Sess. 9-10 (1956) (emphasis added). Thus, Congress has addressed the "problem" of franchise establishment, indicating unequivocally that it did not want to prevent good faith appointments of additional franchises. Moreover, the "problems" of franchise establishment are not of peculiarly local concern. *See id.* at 3. ("collectively the automobile-dealer group is of great importance to the [national] economy"). Therefore, any problems caused by "destructive" competition in this nationwide industry are problems to be addressed by Congress. *See, e.g.*, Missouri v. Kansas Natural Gas Co., 265 U.S. 298 (1924).

Although the commerce clause argument was absent from the *Orrin W. Fox* opinion, an examination of the record discloses that it was briefed by both sides and that the Court was aware of it early in the case. *See* Appellee's Motion to Affirm at 10 n.5; Brief of Appellees at 53-5 n.43, New Motor Vehicle Bd. v. Orrin W. Fox Co., 439 U.S. 96 (1978). Moreover, the primary case relied upon by appellants was *Exxon v. Governor of Md.* New Motor Vehicle Board's reply brief at 22-23 n.16; Northern California Motor Car Dealers Ass'n's reply brief at 23-30; Brief of amicus curiae at 17-28. Thus, the issue was squarely presented to the Court and its failure to resolve the issue allowed the courts to reach a possibly incorrect result in reliance upon *Exxon. See* American Motors Sales Corp. v. Division of Motor Vehicles, 592 F.2d 219 (4th Cir. 1979), *rev'g* 445 F. Supp. 902 (E.D. Va. 1978); Chrysler Corp. v. New Motor Vehicle Bd., 89 Cal. App. 3d 1034, 153 Cal. Rptr. 135 (1979); Tober Foreign Motors, Inc. v. Reiter Oldsmobile, Inc., 381 N.E.2d 908 (Mass. 1978). The Court's action is particularly perplexing in view of its resolution of the antitrust challenge, to which it replied, "[t]he District Court did not pass upon this contention. We choose to address it because the underlying facts are disputed and the question presented is purely one of law." 439 U.S. at 109 n.13. Does this not also apply to the commerce clause challenge? In view of the Court's action in *Orrin W. Fox* and the denial of certiorari in *General GMC Trucks,* one can only conclude that the commerce clause remains a viable challenge to state motor vehicle franchise provisions.

Furthermore, if establishment restrictions are overly concerned with the needs of existing dealers rather than with the needs of the public, the argument could be made that the legislation is not proper under the police power. *See* note 106 *supra. See also* Comment, *supra* note 133.

eral Good Faith Act,[152] the states have nevertheless hastened to attempt to stamp them out. Many states characterize coercion generally as an unfair practice or as a ground for revocation or suspension of the manufacturer's license and provide that a manufacturer "shall not coerce or attempt to coerce any . . . dealer to accept delivery of any . . . vehicles, parts or accessories therefor or any other commodities which have not been ordered by such dealer."[153] Apart from the "forcing" problem, the states also seek to expand the dealer's protection from other forms of coercion. Thus, many generally provide that a manufacturer shall not attempt "to coerce any . . . dealer to enter into agreement with such manufacturer . . . or do any other act unfair to such dealer by threatening to cancel or not renew any franchise. . . ."[154]

Furthermore, legislatures, realizing that a dealer is at the

152. *See generally* note 81 *supra* and accompanying text.

153. ARIZ. REV. STAT. ANN. § 28-1323.01(A) (1976). *See also* ARK. STAT. ANN. § 75-2305(3)(a) (1979); COLO. REV. STAT. § 12-6-120(c) (1978); FLA. STAT. ANN. § 320.64(5) (West 1975) (repealed eff. July 1, 1980); HAWAII REV. STAT. § 437-28(b)(22)(F) (1976); IDAHO CODE §§ 49-2414(7)(a)-(c) (Supp. 1979); IND. CODE ANN. § 9-10-3-2(2) (Burns Supp. 1979); KAN. STAT. ANN. § 8-2308(a)(13)(*i*) (1975); KY. REV. STAT. 190.040(1)(m) (Supp. 1978); LA. REV. STAT. ANN. §§ 32:1254(A)(3)(a)-:1254(A)(3)(c) (West 1963); ME. REV. STAT. ANN. tit. 10, § 1174(2) (Supp. 1979-1980); MD. TRANSP. CODE ANN. § 15-207(b)(2) (1977); MICH. COMP. LAWS ANN. § 445.527 (Supp. 1979-1980); MONT. REV. CODES ANN. § 51-606(1) (Supp. 1977); NEV. REV. STAT. § 482.36391 (1977); N.H. REV. STAT. ANN. § 357-B:4(II) (Supp. 1977); N.M. STAT. ANN. §§ 57-16-5(A)-(C) (1978); N.C. GEN. STAT. § 20-305(1) (1978); OKLA. STAT. ANN. tit. 47, §§ 565(i), 571(a) (West Supp. 1979-1980); R.I. GEN. LAWS §§ 31-5-23(5), -5.1-4(B) (1968 & Supp. 1978); S.C. CODE § 56-15-40(2) (1976); TENN. CODE ANN. § 59-1714(c)(22) (Supp. 1979); TEX. REV. CIV. STAT. ANN. art. 4413(36), § 5.02(1) (Vernon Supp. 1980); UTAH CODE ANN. §§ 41-3-23(c)(1) to -23(c)(3) (1953); VT. STAT. ANN. tit. 9, § 4074(b) (Supp. 1979); VA. CODE § 46.1-547(a) (Supp. 1979); WASH. REV. CODE ANN. § 46.70.180(10)(a) (Supp. 1978); W. VA. CODE § 47-17-5(j) (Supp. 1979); WIS. STAT. ANN. § 218.01(3)(a)(15) (West Supp. 1979-1980).

154. ARIZ. REV. STAT. ANN. § 28-1323.01(B) (1976). Similarly vague standards also forbid the manufacturer to act in a manner "prejudicial," "financially detrimental," or "without due regard to the equities of the dealer." *See* ARK. STAT. ANN. § 75-2305(A)(4)(b) (1979); COLO. REV. STAT. § 12-6-120(b) (1978); FLA. STAT. ANN. §§ 320.64(6)-.64(7) (West 1975) (repealed eff. July 1, 1980). Some also prohibit manufacturer's threats to open a competing dealership. *E.g.*, HAWAII REV. STAT. § 437-28(b)(22)(A) (1976). *See also* IDAHO CODE § 49-2414(7)(d) (Supp. 1979); KAN. STAT. ANN. § 8-2308(a)(13)(*iii*) (1975); KY. REV. STAT. § 190.040(1)(n) (Supp. 1978); LA. REV. STAT. ANN. § 32:1254(A)(4)(b) (West 1963); ME. REV. STAT. ANN. tit. 10, § 1174(3)(B) (Supp. 1979-1980); MD. TRANSP. CODE ANN. § 15-207(b)(1) (1977); MASS. GEN. LAWS ANN. ch. 93B, § 4(3)(d) (Supp. 1979); MISS. CODE ANN. § 63-17-73(1)(d)(2) (1972); MONT. REV. CODES ANN. § 51-606(2) (Supp. 1977); N.H. REV. STAT. ANN. § 357-B:4(III)(b) (Supp. 1977); N.M. STAT. ANN. § 57-16-5(E) (1978); N.C. GEN. STAT. § 20-305(2) (1978); OKLA. STAT. ANN. tit. 47, §§ 565(j)(2)-565(j)(3), 569(a) (West Supp. 1979-1980); R.I. GEN. LAWS §§ 31-5-23(6) to 23(7), 31-5.1-4(C)(2) (Supp. 1978); S.C. CODE § 56-15-40(3)(b) (1976); TENN. CODE ANN. § 59-1714(c)(21) (Supp. 1979); UTAH CODE ANN. § 41-3-23(c)(4) (1953); VT. STAT. ANN. tit. 9, § 4074(c)(2) (Supp. 1979); VA. CODE § 46.1-547(b) (Supp. 1979); WASH. REV. CODE ANN. § 46.70.180(10)(d) (Supp. 1978); W. VA. CODE § 47-17-5(j) (Supp. 1979); WIS. STAT. ANN. §§ 218.01(3)(a)(16), 218.01(7) (West 1957 & Supp. 1979-1980).

mercy of the manufacturer for his supply of automobiles, also seek to prevent a possible source of coercion by requiring the manufacturer to deliver automobiles in reasonable quantities and within a reasonable time.[155] Some provide for strict time periods, while others mercifully excuse the manufacturer for delays that are truly beyond its control.[156] Meanwhile, several states attempt to prevent coercion by means of price discrimination, either among dealers or between dealers and third parties[157] or through discrimination among dealers with regard to warranty reimbursement.[158]

7. Warranty Rate Reimbursement Provisions

States often provide for a system of warranty rate reimbursement under which dealers are paid for the work performed in honoring the manufacturer's warranties. The ostensible purpose for these provisions is to encourage the dealer to give the customer-public adequate service by guaranteeing him fair compensation.[159] Some of the statutes, when examined, may actually lead to a much less desirable result.

Warranty provisions also have a wide variety of terms. Some

155. ARK. STAT. ANN. § 75-2305(A)(4)(a) (1979); COLO. REV. STAT. § 12-6-120(e) (1978); FLA. STAT. ANN. § 320.64(12) (West 1975) (repealed eff. July 1, 1980); HAWAII REV. STAT. § 437-28(b)(22)(D) (1976); IDAHO CODE § 49-2414(7)(e) (Supp. 1979); KAN. STAT. ANN. § 8-2308(a)(15) (1975); LA. REV. STAT. ANN. § 32:1254(A)(4)(a) (West 1963); ME. REV. STAT. ANN. tit. 10, § 1174(3)(A) (Supp. 1979-1980); MD. TRANSP. CODE ANN. § 15-208 (1977); MASS. GEN. LAWS ANN. ch. 93B, § 4(3)(c) (Supp. 1979); MICH. COMP. LAWS ANN. §§ 445.527, 445.529 (Supp. 1979-1980); MISS. CODE ANN. § 63-17-73(1)(d)(1) (1972); N.H. REV. STAT. ANN. § 357-B:4(III) (a) (Supp. 1977); N.M. STAT. ANN. § 57-16-5(D) (1978); OKLA. STAT. ANN. tit. 47, §§ 565(j)(1), 571(b) (West Supp. 1979-1980); PA. STAT. ANN. tit. 63, § 805(2)(xiv)(a) (Purdon Supp. 1979-1980); R.I. GEN. LAWS § 31-5.1-4(C)(1) (Supp. 1978); S.C. CODE § 56-15-40(3)(a) (1976); TENN. CODE ANN. § 59-1714(c)(1) (Supp. 1979); TEX. REV. CIV. STAT. ANN. art. 4413(36), § 5.02(2) (Vernon Supp. 1980); UTAH CODE ANN. § 41-3-23(c)(5) (1953); VT. STAT. ANN. tit. 9, § 4074(c)(1) (Supp. 1979); VA. CODE § 46.1-547(g) (Supp. 1979); WASH. REV. CODE ANN. § 46.70.180(10)(e) (Supp. 1978); W. VA. CODE §§ 47-17-5(f) to -5(g) (Supp. 1979).

156. States usually allow for an Act of God, a strike, an embargo, or some other cause over which the manufacturer has no control. *E.g.*, MISS. CODE ANN. § 63-17-73(1)(d)(1) (1972); S.C. CODE § 56-15-40(3)(a) (1976). On the other hand several provide for an absolute period of time, usually 60 days. *E.g.*, TENN. CODE ANN. § 59-1714(c)(1) (Supp. 1979).

157. ARK. STAT. ANN. §§ 75-2305(A)(4)(e) to -2305(A)(4)(g) (1979); HAWAII REV. STAT. § 437-28(b)(22)(E) (Supp. 1978); ME. REV. STAT. ANN. tit. 10, §§ 1174(3)(E)-1174(3)(G) (Supp. 1979-1980); MASS. GEN. LAWS ANN. ch. 93B, §§ 4(3)(f)-4(3)(h) (West Supp. 1979); MISS. CODE ANN. §§ 63-17-73(1)(d)(5) to -73(1)(d)(7) (1972); N.H. REV. STAT. ANN. §§ 357-B:4(III)(e)-:4(III)(g) (Supp. 1977); N.M. STAT. ANN. §§ 57-16-5(H) to -5(J) (1978); R.I. GEN. LAWS §§ 31-5.1-4(C)(5) to -4(c)(6) (Supp. 1978); S.C. CODE §§ 56-15-40(3)(e) to -40(3)(g) (1976); S.D. CODIFIED LAWS ANN. § 32-6A-14 (1976).

158. *E.g.*, NEV. REV. STAT. § 482.36385(2) (1977); TENN. CODE ANN. § 59-1714(c)(18) (Supp. 1979).

159. *See* Brief for Volkswagen, Volkswagen of America, Inc. v. Vaughn Motor Co., No. 0960-6-18-79 (Tenn. Motor Vehicle Comm'n 1979) (copy on file with *Vanderbilt Law Review*).

require that the dealer be compensated "adequately and fairly"[160] for warranty work, while others require that he be compensated "reasonably"[161] or "fairly."[162] Another employs the now familiar "unfairly and without due regard to the equities"[163] language to determine the appropriate rate. Meanwhile, two states apparently rely upon the bargaining process between the manufacturer and the dealer to establish the rate.[164]

In attempting to oversee the fairness of warranty rate reimbursement, several states initially require that the manufacturer file with the appropriate authority a schedule of compensation[165] showing the time allowances and rates for certain work. Others enumerate factors to be considered by the governing authority in reaching

160. ALA. CODE § 32-17-1 (1975); ARK. STAT. ANN. § 75-2306(A)(10) (1979); CAL. VEH. CODE § 3065 (West Supp. 1979); GA. CODE ANN. § 84-6610(c)(6) (Supp. 1979); ME. REV. STAT. ANN. tit. 10, § 1176 (Supp. 1979-1980); MASS. GEN. LAWS ANN. ch. 93B, § 6 (West 1972); MISS. CODE ANN. § 63-17-85(j) (Supp. 1979); N.H. REV. STAT. ANN. § 357-B:6 (Supp. 1977); N.M. STAT. ANN. § 57-16-7 (1978); S.C. CODE § 56-15-60 (1976); TEX. REV. CIV. STAT. ANN. art. 4413(36), § 5.02(9) (Vernon Supp. 1980); VT. STAT. ANN. tit. 9, § 4076 (Supp. 1979).

161. ARIZ. REV. STAT. ANN. § 28-1304.01(E) (Supp. 1979-1980); COLO. REV. STAT. § 12-6-114 (1978); FLA. STAT. ANN. § 320.696 (repealed eff. July 1, 1980) (West 1975); ILL. ANN. STAT. ch. 95 ½, § 5-103 (Smith-Hurd Supp. 1979); KAN. STAT. ANN. § 8-2308(a)(14) (1975); KY. REV. STAT. § 190.046 (Supp. 1978); MD. TRANSP. CODE ANN. § 15-212 (1977); MICH. COMP. LAWS ANN. § 445.530 (Supp. 1979-1980); N.C. GEN. STAT § 20-305.1 (1978); PA. STAT. ANN. tit. 63, § 805(2)(xiv)(b) (Purdon Supp. 1979-1980); VA. CODE § 46.1-547.1 (Supp. 1979); WIS. STAT. ANN. § 218.01(3)(a)(22) (West Supp. 1979-1980).

162. IND. CODE ANN. § 9-10-3-2(8) (Burns Supp. 1979); NEV. REV. STAT. § 482.36385(3) (1977); R.I. GEN. LAWS § 31-5.1-6 (Supp. 1978).

163. ARK. STAT. ANN. § 75-2306(A)(10) (1979) provides that a manufacturer shall not "unfairly and without due regard to the equities of the parties or to the detriment of the public welfare [fail] to fulfill any warranty agreement or . . . adequately and fairly compensate any of its motor vehicle dealers." Prior to 1977, Tennessee had an identical provision. *See* TENN. CODE ANN. § 59-1714(h)(7) (1968) (repealed 1977 Tenn. Pub. Acts ch. 162, § 24). Under such a provision, if the manufacturer fulfills an agreement, does the reimbursement still have to meet the "adequate and fair" test? Does the language make the provision unconstitutionally vague, particularly in states in which there are criminal penalties? *See* General Motors Corp. v. Blevins, 144 F. Supp. 381 (D. Colo. 1956).

164. Iowa requires the manufacturer to "fulfill the terms" of the warranty agreement. IOWA CODE ANN. § 322A(5) (West Supp. 1979-1980). Meanwhile, West Virginia seems to have the fairest method of setting warranty reimbursement. Under that statute, the rate shall be *mutually* agreed upon by the dealer and manufacturer. If they are unable to agree, the rate is then determined by the courts. *See* W. VA. CODE § 47-17-10 (Supp. 1979). It has been suggested that the primary function of these statutes should be to encourage parties to agree without burdening the courts. *See* Note, *Statutory Regulation of Manufacturer-Dealer Relationships in the Automobile Industry,* 70 HARV. L. REV. 1239, 1256 (1957).

165. ARIZ. REV. STAT. ANN. § 28-1304.01(E) (Supp. 1979-1980); CAL. VEH. CODE § 3065 (West Supp. 1979); COLO. REV. STAT. § 12-6-114 (1978); CONN. GEN. STAT. ANN. § 14-67a (West Supp. 1979); GA. CODE ANN. § 84-6610(c)(6) (Supp. 1979); IDAHO CODE § 49-2420 (Supp. 1979); ILL. ANN. STAT. ch. 95 ½, § 5-103 (Smith-Hurd Supp. 1979); KY. REV. STAT. § 190.0462 (Supp. 1978). In what is perhaps one of the most egregious examples of favoring the dealer, Tennessee allows the dealer to file what he will charge; thus, the reimbursement rate is set *unilaterally* by the dealer. *See* TENN. CODE ANN. § 59-1722 (Supp. 1979).

its decision on the reasonableness of a reimbursement rate.[166] One factor, focused upon by a substantial number of states, is the labor rate that the dealer normally charges his nonwarranty, or retail, customers. Many allow this to be *merely* a factor,[167] but some have provisions that forbid the manufacturer to "pay to its dealers a labor rate per hour for warranty repairs or servicing less than the dealer's retail labor rate for similar repairs."[168] Thus, the dealer's rate under such provisions is basically whatever the dealer unilaterally determines it to be. Besides presenting unique constitutional problems[169]

166. Among the factors usually listed are the effective labor rate charged by the dealer to its regular retail customers, the compensation rate for other dealers, the prevailing wage rate being paid by the dealers, the time required, and the compensation paid by other manufacturers. Veh. Code § 3065 (West Supp. 1979); FLA. STAT. ANN. § 320.696 (West 1975) (repealed eff. July 1, 1980); GA. CODE ANN. § 84-6610(c)(6) (Supp. 1979); KAN. STAT. ANN. § 8-2317(b) (1975); KY. REV. STAT. § 190.046 (Supp. 1978); MD. TRANSP. CODE ANN. § 15-212(b) (1977); NEV. REV. STAT. § 482.36385(3) (1977); N.C. GEN. STAT. § 20-305.1(a) (1978); VA. CODE § 46.1-547.1(a) (Supp. 1979). In Virginia, at least, the list of factors seems to be superfluous since the statute also provides that the compensation may not be less than that charged retail customers.

167. *See generally* note 166 *supra.*

168. TENN. CODE ANN. § 59-1722 (Supp. 1979). The statutes may also be couched in equally effective terms such as "equal to." *See, e.g.,* ALA. CODE § 32-17-1 (1975); ARK. STAT. ANN. § 75-2306(A)(10) (1979); IDAHO CODE § 49-2420 (Supp. 1979); KY. REV. STAT. § 190.046(2) (Supp. 1978); MISS. CODE ANN. § 63-17-85(j) (Supp. 1979); MONT. REV. CODES ANN. § 51-604(5) (Supp. 1977); N.H. REV. STAT. ANN. § 357-B:9-a(II)(a) (Supp. 1977); N.J. STAT. ANN. § 56:10-15(a) (West Supp. 1979-1980); TEX. REV. CIV. STAT. ANN. art. 4413(36), § 5.02(9) (Vernon Supp. 1980); VT. STAT. ANN. tit. 9, § 4076(b) (Supp. 1979); VA. CODE § 46.1-547.1(a) (Supp. 1979); WIS. STAT. ANN. § 218.01(3)(a)(22) (West Supp. 1979-1980).

169. Statutes that unilaterally allow dealers to set reimbursement rates seemingly constitute an unconstitutional delegation of authority to private individuals. As the United States Supreme Court stated in *Schecter Poultry Corp. v. United States,* in which the Court declared the National Industrial Recovery Act unconstitutional, "[w]ould it be seriously contended that Congress would delegate its legislative authority to trade or industrial associations or groups so as to empower them to enact the laws they deem to be wise and beneficient for the rehabilitation and expansion of their trade or industries?" 295 U.S. 495, 537 (1935). Of particular relevance is Wagner v. City of Milwaukee, 177 Wis. 410, 188 N.W. 487 (1922), in which a city ordinance provided that the prevailing wage to be paid to employees of contractors performing work for the city would be determined "by the wage paid to members of any regular and recognized organization of such skilled laborers for such skilled labor." The regulation was held invalid as an improper delegation to unions of the power to determine and fix the prevailing wage scale. *See also* Carter v. Carter Coal Co., 298 U.S. 238 (1936). If mere proposals are submitted for approval by an agency, no unconstitutional delegation occurs, but a higher standard of protection is required for the other party than minimal due process. *See* Pennsylvania Coal Mining Ass'n v. Insurance Dep't, 471 Pa. 437, 370 A.2d 685 (1977). With regard to motor vehicle warranty reimbursement, however, no agency action is required by the literal wording of the statute. Even if agency action was required, what about the situations in which the agency is composed of auto dealers? It is certainly doubtful that this would meet the requisite "higher standard of protection" since dealers have an interest in seeing reimbursement rates rise.

This argument regarding warranty rate reimbursement has not yet appeared in any reported decision but the argument was presented in an unreported Tennessee case. Volkswagen of America, Inc. v. Tennessee Motor Vehicle Comm'n, Davidson Equity No. A-7901-I

these provisions present a practical dilemma—undue emphasis upon the retail rate regularly charged may actually have a harmful rather than a helpful effect upon the public. This result is compelled if the dealer can unilaterally set the rate with no reference to mechanics' wages. The dealer may pay low wages, which may lead to low skill or undermotivated mechanics who in turn provide poor customer service.[170] At the same time, however, he may raise his "posted" retail rate in order to cover other business costs.[171] Thus, the manufacturer could be forced to reimburse the dealer at a high cost without receiving its money's worth in terms of service to the public. Furthermore, every dealer might have a different rate, causing the manufacturer overwhelming burdens in studying each individual dealer.[172] The combination of these factors strongly suggests

(Tenn. App. Sept. 8, 1978). When the Court of Appeals was notified that such provisions allow the dealer to unilaterally set the rate of compensation, the court astutely replied that "[t]he Court recognizes that on its face this may appear to be somewbat unusual but it is, after all, the mandate of tbe legislature. The dealer unilaterally decides what he will charge his other retail customers." *Id.* at 4-5 (A copy of this opinion is on file with the *Vanderbilt Law Review* together with the briefs of the parties). This view, coupled with the fact that tbat warranty work comprised only 10% of the dealer's repair work, led the court to conclude that there was no unconstitutional delegation. The court cited no authority for its position nor did it seek to distinguish those cases cited to it. Even a cursory examination of tbe statutes and the relevant case law suggests that the court is in error and has bent double in order to accommodate the dealers' interests. *See also* note 170 *infra.* The statutes may also pose interesting antitrust problems. While the primary argument on the other side would be that they are "state action" and thus outside the purview of the antitrust laws, do these statutes not merely authorize private anticompetitive conduct—price fixing—rather tban substitute a scheme of regulation? *See* note 149 *supra.*

170. In a recent administrative proceeding before the Tennessee Motor Vehicle Commission, this was precisely the situation. *See* Volkswagen of America, Inc. v. Vaughn Motor Co., Docket No. 0960-6-18-79 (Tenn. Motor Vehicle Comm'n 1979). The hearing officer's conclusions showed that the statute was for the *protection of local dealers. Id.* at 5 (copies of the relevant documents from this administrative proceeding are on file with the *Vanderbilt Law Review*). Does this legislation favor dealers or the public? Recall the discussion in note 106 *supra.* When the hearing officer was shown that wages should be the reimbursement standard in order to have motivated mechanics who will give good service *to the public,* his response was that "this is not Vaughn Motor Company's problem. If *they* are able to pay their mechanics and get what *they* consider a satisfactory performance, then they should be allowed to charge whatever rate is necessary *in order to maintain a proper profit margin." Id.* at 6 (emphasis added). The hearing officer thus determined the dealer's rate of $20.00 coupled with a mechanic wage rate of $6.66 per hour to be reasonable "in light of economic circumstances."

171. In the *Volkswagen* administrative decision, note 170 *supra,* there was evidence that the dealer had moved in order to accommodate another manufacturer's line of cars and that due to the relative amounts of warranty work on the two lines of cars, the higher Volkswagen reimbursement rate subsidized the dealer's other business. *See* Complainant's Exceptions and Argument In Response To Hearing Examiner's Proposed Decision at 4, Volkswagen of America, Inc. v. Vaughn Motor Co., Docket No. 0960-6-18-79 (Tenn. Motor Vehicle Comm'n 1979) (Copy on file with *Vanderbilt Law Review*).

172. The Volkswagen hearing examiner considered this "overwhelming." Volkswagen of America, Inc. v. Vaughn Motor Co., at 2.

the need for a uniform, perhaps national, reimbursement rate that is weighted more heavily upon mechanics' wages.[173]

8. Penalties and Civil Damages

Among the more common penalties for manufacturer mistreatment of its dealer is suspension or revocation of the manufacturer's license to do business within the state.[174] Several states provide that such revocations may be limited to a certain geographic area.[175] When a license revocation is so limited, however, there appears little

173. The formula proposed in the *Volkswagen* decision by the manufacturer reimbursed the dealer at 240% of the mechanics' hourly wage plus 150% of the mechanics' hourly fringe benefits. A short form election allowed the dealer, at his option, to be reimbursed at a flat 255% of mechanics' wages. Interestingly, the hearing officer termed the Volkswagen formula a "*very sound* standardized formula for setting reimbursement rates on a nationwide basis." He also determined that "[the dealer's] rates are *excessive* when considered in light of [Volkswagen's] formula." *Id.* at 4-5 (emphasis added). Thus, we are left with a dealer's reimbursement rate that was legitimate because it was "excessive" when compared to a "very sound" formula, an interesting result indeed. One other peculiarity of Tennessee is that prior to 1977 the statute called for "adequate and fair" compensation using the "unfairly without due regard to the equities" language. *See* TENN. CODE ANN. § 59-1714(h)(7) (1968) (statute no longer in force). In 1971, the State of Tennessee entered a consent decree with General Motors, which had challenged the constitutionality of the statute. General Motors Corp. v. McCanless, No. 5107 (M. D. Tenn. Mar. 1, 1971) (a copy of this consent decree is on file with the *Vanderbilt Law Review*). The decree incorporated a schedule of compensation that reimbursed the dealer at 220% of the mechanics' base rate plus 150% of the average hourly fringe benefits including paid vacations, pay in lieu of vacation, holiday pay, sick pay, separation allowance, hospital insurance, retirement or pension plan, uniforms and laundry, and group life insurance. The State and GM agreed that this was "fair and adequate" and therefore in compliance with TENN. CODE ANN. § 59-1714(h)(7) (1968) (statute no longer in force). With the passage of the new statute, the decree is effectively abrogated. Could this possibly be a contract clause violation since it was the *State's* contract (consent decree)? *See* United States Trust Co. v. New Jersey, 431 U.S. 1 (1977). Might the new statute also have retroactively abridged the rights of contracts (franchises) that were entered into prior to the passage of the new statute and that had incorporated the above formula? *Cf., id.* (impairment, if any, of contract is to he weighed against public policy interest underlying impairing legislation).

174. ARIZ. REV. STAT. ANN. § 28-1323 (1976); ARK. STAT. ANN. § 75-2306(A) (1979); COLO. REV. STAT. § 12-6-118 (1978); CONN. GEN. STAT. ANN. § 14-67c (West Supp. 1979); FLA. STAT. ANN. § 320.64 (West 1975) (repealed eff. July 1, 1980); GA. CODE ANN. § 84-6610 (Supp. 1979); IND. CODE ANN. § 9-10-2-7 (Burns Supp. 1979); KAN. STAT. ANN. §§ 8-2308, -2309 (1975); LA. REV. STAT. ANN. § 32:1255 (West Supp. 1979); MD. TRANSP. CODE ANN. § 15-212 (1977); MISS. CODE ANN. § 63-17-85 (Supp. 1979); NEB. REV. STAT. § 60-1411.02 (1978); OHIO REV. CODE ANN. § 4517.33 (Page Supp. 1978); OKLA. STAT. ANN. tit. 47, § 565 (West Supp. 1979-1980); PA. STAT. ANN. tit. 63, § 805(2) (Purdon Supp. 1979-1980); R.I. GEN. LAWS § 31-5-23 (1968); TENN. CODE ANN. § 59-1714 (Supp. 1979); TEX. REV. CIV. STAT. ANN. art. 4413(36), § 4.06(a) (Vernon Supp. 1980); UTAH CODE ANN. §§ 41-3-8(3) to -8(4) (1953); VA. CODE § 46.1-537 (1974); WASH. REV. CODE ANN. § 46.70.101 (Supp. 1978); WIS. STAT. ANN. § 218.01(3) (Supp. 1979-1980).

175. ARIZ. REV. STAT. ANN. § 28-1323(C) (1976); ARK. STAT. ANN. § 75-2306(B) (1979); FLA. STAT. ANN. § 320.642 (West 1975) (repealed eff. July 1, 1980); GA. CODE ANN. § 84-6610(a)(4) (Supp. 1979); IND. CODE ANN. § 9-10-2-7(c) (Burns Supp. 1979); KAN. STAT. ANN. § 8-2308(f) (1975); MISS. CODE ANN. § 63-17-87 (1972).

concern for either a terminated dealer or the needs of the public.[176] On the other hand, to revoke the manufacturer's license for the *entire state* would seem clearly unconstitutional,[177] highly impractical, and likewise harmful to the public.

Other states regulate the conduct of manufacturers through criminal sanctions.[178] These have been termed "unworkable" because they depend upon the state for enforcement and are not sufficiently flexible for the regulation of the complex manufacturer-dealer relationship.[179] Other fines and penalties, however, may be slightly more practical if they are severe enough to deter unfair manufacturer conduct.[180] Nevertheless, the effectiveness of these

176. This does not overlook the other grounds for revocation of the manufacturer's license such as "forcing," failure to deliver autos, or discrimination among dealers. *See e.g.* TENN. CODE ANN. § 59-1714(c) (Supp. 1979). Note that the grounds for revocation of the manufacturer's license have *nothing* to do with the public good—instead they focus upon the good of the dealer. In any event, what benefit accrues to the wronged, perhaps terminated, dealer when the manufacturer's license is revoked? Furthermore, think of the *other* dealers penalized by revocation of the manufacturer's license. This consideration has caused one commentator to suggest that fines and perhaps criminal penalities are more practical. *See* Note, *supra* note 13, at 1020-21. *See also* Note, *supra* note 164, at 1243. If a manufacturer's license is terminated in a state (extreme) or even a locality, those members of the public who desire to purchase automobiles of that particular manufacturer would necessarily be burdened. Furthermore, the competitors would probably be thrilled, particularly the other dealers in the area. In this context, see note 244 *infra* and accompanying text.

177. As one commentator has stated, "although no problem of discrimination against out-of-state products is involved, the statutes may be considered objectionable because the revocation of a license to do business in a state . . . will operate to prohibit completely the transporation of automobiles into that state for sale." Note, *supra* note 164, at 1244. *See* St. Louis S.W. Ry. v. Arkansas, 235 U.S. 350, 368 (1914). *See also* Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511 (1935); Leisy v. Hardin, 135 U.S. 100 (1890). For a discussion of the commerce clause challenge, see note 106 *supra*.

178. ALA. CODE § 32-17-2 (1975); ARIZ. REV. STAT. ANN. § 28-1326 (1976); ARK. STAT. ANN. § 75-2308 (1979); COLO. REV. STAT. § 12-6-121 (1978); FLA. STAT. ANN. § 320.70 (West 1975) (repealed eff. July 1, 1980); HAWAII REV. STAT. § 437-35 (1976); IDAHO CODE § 49-2419 (Supp. 1979); IND. CODE ANN. § 9-10-5-1 (Burns Supp. 1979); LA. REV. STAT. ANN. § 32:1257 (West 1963); ME. REV. STAT. ANN. tit. 10, § 1186 (Supp. 1979-1980); MINN. STAT. ANN. §§ 325.15-.23 (West 1966); MISS. CODE ANN. § 63-17-105 (1972); MONT. REV. CODES ANN. § 51-614 (Supp. 1977); N.H. REV. STAT. ANN. § 357-B:17 (Supp. 1977); N.M. STAT. ANN. § 57-16-16 (1978); N.C. GEN. STAT. § 20-308 (1978); OHIO REV. CODE ANN. § 4517.99 (Page Supp. 1978); OKLA. STAT. ANN. tit. 47, § 564 (West Supp. 1979-1980); PA. STAT. ANN. tit. 63, § 812 (Purdon Supp. 1979-1980); R.I. GEN. LAWS § 31-5-27 (1968); TENN. CODE ANN. § 59-1718 (Supp. 1979); UTAH CODE ANN. §§ 41-3-3 to -27 (1953); VA. CODE § 46.1-522 (1974); WIS. STAT. ANN. § 218.01(8) (Supp. 1979-1980).

179. Note, *supra* note 164, at 1243.

180. Note, *supra* note 13, at 1021. *Cf.* Note, *supra* note 164, at 1243 (expressing fear that some penalties may not be severe enough to deter prohibited conduct). Several states presently impose fines on the manufacturer. *E.g.*, FLA. STAT. ANN. § 320.698 (West 1975)(repealed eff. July 1, 1980); IND. CODE ANN. § 9-10-5-2 (Burns Supp. 1979); KAN. STAT. ANN. § 8-2309(b) (1975); LA. REV. STAT. ANN. § 32:1256(C) (West Supp. 1979); MD. TRANSP. CODE ANN. § 15-212(c) (1977); MINN. STAT. ANN. §§ 325.15-.23 (West 1966); MISS. CODE ANN. § 63-17-105 (1972); NEV. REV. STAT. § 482.36425 (1977); N.Y. GEN. BUS. LAW § 199 (Supp. 1979-1980);

statutes appears to depend upon the court's willingness to imply a private right of action, although an implied tort theory of recovery could restrict the damages available to the dealer.[181]

Commentators have thus noted that express rights of action with civil damages for wronged dealers constitute the most favorable means of regulating the manufacturer-dealer relationship. Several states have taken heed and passed statutes giving those harmed a private right of action.[182] Some provide only for "damages,"[183] while others give double[184] or treble[185] damages. Attorneys' fees are also a common element of recovery.[186]

9. Summary

There is a vast array of state statutes that deal specifically with the automobile dealer-manufacturer relationship. There has been little litigation under the statutes, possibly because many use language that at best can be termed confusing and present many interpretation difficulties. This is in sharp contrast to the large numbers of suits that are brought under the Federal Good Faith Act.

The manufacturers' most effective attack against state legislation has been by constitutional challenge.[187] Statutes have been attacked as "vagne and uncertain,"[188] as burdens upon interstate commerce,[189] and as special interest legislation.[190] Nevertheless, these

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TENN. CODE ANN. § 59-1718 (Supp. 1979); TEX. REV. CIV. STAT. ANN. art. 4413(36), § 6.01 (Vernon 1976).

181. *See* Note, *supra* note 164, at 1243.

182. *E.g.*, ARK. STAT. ANN. § 75-2309 (1979); ME. REV. STAT. ANN. tit. 10, § 1173 (Supp. 1979-1980); MINN. STAT. ANN. § 325.236 (West 1966); R.I. GEN. LAWS § 31-5.1-13 (Supp. 1978); UTAH CODE ANN. § 41-3-18 (1953); WASH. REV. CODE ANN. § 46.70.190 (Supp. 1978); W. VA. CODE §§ 47-17-6 to-7 (Supp. 1979). *See also* notes 183-86 *infra*.

183. COLO. REV. STAT. § 12-6-122(1) (1978); FLA. STAT. ANN. § 320.697 (West Supp. 1979) (repealed eff. July 1, 1980); GA. CODE ANN. § 84-6612 (1979); HAWAII REV. STAT. § 437-36 (1976); IND. CODE ANN. § 9-10-5-5 (Burns Supp. 1979); MD. TRANSP. CODE ANN. § 15-213 (1977); MASS. GEN. LAWS ANN. ch. 93B, § 12A (West Supp. 1979); MICH. COMP. LAWS ANN. §§ 445.532-.533 (Supp. 1979-1980); MISS. CODE ANN. § 63-17-101 (1972); NEV. REV. STAT. § 482.36411(2) (1977); N.H. REV. STAT. ANN. § 357-B:3(II) (Supp. 1977); N.J. STAT. ANN. § 56:10-10 (West Supp. 1979-1980); N.M. STAT. ANN. § 57-16-13 (1978); N.D. CENT. CODE § 51-07-01.1 (Supp. 1979); OKLA. STAT. ANN. tit. 47, § 565(j)(4) (West Supp. 1979-1980); TEX. REV. CIV. STAT. ANN. art. 4413(36), § 6.06 (Vernon Supp. 1980).

184. S.C. CODE § 56-15-110(1) (1976).

185. COLO. REV. STAT. § 12-6-122(2) (1978); FLA. STAT. ANN. § 320.697 (West Supp. 1979) (repealed eff. July 1, 1980); MONT. REV. CODES ANN. § 51-615 (Supp. 1977); N.M. STAT. ANN. § 57-16-13 (1978); S.C. CODE § 56-15-110(3) (1976); WIS. STAT. ANN. § 218.01(9) (West Supp. 1979-1980).

186. *See generally* notes 183-85 *supra*.

187. S. MACAULAY, *supra* note 70, at 135.

188. *E.g.*, General Motors Corp. v. Blevins, 144 F. Supp. 381 (D. Colo. 1956) (invalidating Colorado law in its entirety).

189. *E.g.*, American Motors Sales Corp. v. Division of Motor Vehicles, 445 F. Supp. 902

statutes persist[191] in the face of criticisms that they offer benefits that are "illusory at best," that they are "confusing,"[192] and that they "raise grave constitutional questions,"[193] a "number of constitutional problems,"[194] or are of "questionable constitutionality."[195]

Although there are a variety of possible constitutional infirmities in these statutes, this Note focuses on only one—the composition of the board or commission that administers the system of regulation. Regardless of the substantive provisions of a particular system, the greatest infirmity occurs when the entire system is administered by the very parties whose relationship with the manufacturer is being regulated—the dealers.

IV. The Due Process Challenge to Board Composition

A. *Background*

In many states motor vehicle franchise legislation is administered by agencies that are composed primarily, if not totally, of automobile dealers.[196] Rarely, if ever, does a manufacturer or a manufacturer representative have even one seat on these boards, much less a chance for meaningful participation or representation. These same boards, however, exercise great control over the manufacturer. They often oversee the licensing of the manufacturer and resolve or adjudicate manufacturer-dealer conflicts that concern termination and establishment of franchises and the reasonableness of warranty rate reimbursement. It is this arrangement, this Note submits, that offends all notions of fairness and due process and therefore should

(E.D. Va. 1978), *rev'd*, 592 F.2d 219 (4th Cir. 1979); Chrysler Corp. v. New Motor Vehicle Bd., 89 Cal. App. 3d 1034, 153 Cal. Rptr. 135 (1979); Tober Foreign Motors, Inc. v. Reiter Oldsmobile, Inc., 381 N.E.2d 908 (Mass. 1978); General GMC Trucks, Inc. v. General Motors Corp., 239 Ga. 373, 237 S.E.2d 194 (1977); Ford Motor Co. v. Pace, 206 Tenn. 559, 335 S.W. 2d 360, *appeal dismissed*, 364 U.S. 444 (1960).

190. *See* General GMC Trucks, Inc. v. General Motors Corp., 239 Ga. 373, 237 S.E.2d 194 (1977); S. MacAulay, *supra* note 70, at 138; Brown & Conwill, *supra* note 107, at 231-33.

191. Professor MacAulay states that the manufacturer's greatest victories were achieved in 1956, when they succeeded in completely overturning the Colorado and Arkansas statutes. General Motors Corp. v. Blevins, 144 F. Supp. 381 (D. Colo. 1956); Rebsamen Motor Co. v. Phillips, 226 Ark. 146, 289 S.W.2d 170 (1956). He adds that "[i]n Colorado apparently the manufacturers won a lasting victory." *But see* Colo. Rev. Stat. §§ 12-6-101 to -213 (1978). Concerning Arkansas, Professor MacAulay noted that "the franchised dealers would bave trouble if they attempted to have a *fourth* statute passed." The other three were invalidated or voted down in a referendum by the voters after being put on the ballot through the efforts of manufacturers. The dealers were unsuccessful until 1975. *See* 1975 Ark. Acts No. 388, *codified as* Ark. Stat. Ann. §§ 75-2301 to -2312 (1979).

192. Brown & Conwill, *supra* note 107, at 231-33.

193. *See* Comment, *supra* note 133, at 737.

194. Note, *supra* note 44, at 1244.

195. *See* Brown & Conwill, *supra* note 107, at 237.

196. *See* notes 115-17 *supra* and accompanying text.

be among the highest priorities in the reform of this area of the law.

The fifth and fourteenth amendments to the United States Constitution generally provide that no person shall be deprived of life, liberty, or property "without due process of law."[197] In the area of due process hearings, the Court has traditionally placed great weight upon *neutrality*—"the right to an impartial decision-maker"—in every case.[198] Because "the appearance of evenhanded justice . . . is at the core of due process,"[199] the Court has disqualified even those decision-makers with "no actual bias" if they reasonably *appeared* to be biased.[200] Thus, the Court has disqualified judges and decision-makers without a showing of actual bias in situations in which "experience teaches that the probability of actual bias on the part of the judge or decision-maker is too high to be constitutionally tolerable."[201] Among the situations identified by the Court as presenting that risk are those in which the judge or decision-maker

(1) has a pecuniary interest in the outcome;[202]
(2) "has been the target of personal abuse or criticism from the party before him";[203]
(3) is "enmeshed in [other] matters involving petitioner . . .";[204] or
(4) might have prejudged the case because of prior participation as an accuser, investigator, fact finder or initial decision-maker.[205]

1. Pecuniary Interest

The landmark case regarding due process limitations upon pecuniary conflicts of interest is *Tumey v. Ohio,*[206] in which a mayor-judge, in addition to his regular salary, was paid a certain sum per case in liquor law violation cases in which he found the defendant guilty. Reviewing the analogous cases in the area, the Court noted that, in the past, "the slightest pecuniary interest of any officer, judicial or quasi judicial, in the resolving of the subject matter

197. U.S. CONST. amend. V, XIV.
198. Arnett v. Kennedy, 416 U.S. 134, 197 (1974) (White, J., concurring in part and dissenting in part).
199. Mayberry v. Pennsylvania, 400 U.S. 455, 469 (1971) (Harlan, J., concurring). *See also* Offut v. United States, 348 U.S. 11 (1954).
200. *See, e.g.,* Morrissey v. Brewer, 408 U.S. 471, 485-86 (1972) (bias of decisionmaker is ground for reversal); Goldberg v. Kelly, 397 U.S. 254, 271 (1970) (same result).
201. Withrow v. Larkin, 421 U.S. 35, 47 (1975).
202. Gibson v. Berryhill, 411 U.S. 564 (1973); Ward v. Village of Monroeville, 409 U.S. 57 (1972); Tumey v. Ohio, 273 U.S. 510 (1927).
203. 421 U.S. at 47 n.15.
204. Johnson v. Mississippi, 403 U.S. 212, 215 (1971).
205. 408 U.S. at 485-86; 397 U.S. at 271; *In re* Murchison, 349 U.S. 133 (1955).
206. 273 U.S. 510 (1927).

which he was to decide, rendered the decision voidable."[207] The common law thus showed "the greatest sensitiveness over the existence of any pecuniary interest, however small or infinitesimal."[208]

With these principles in mind, the Court held that the Ohio system under which the mayor-judge received fees for convictions was a denial of due process. The Court noted that due process was not satisfied by the argument "that men of the highest honor and the greatest self-sacrifice could carry it on without the danger of injustice."[209] Instead, every procedure that offered "a possible temptation to the average man . . . not to hold the balance nice, clear and true between the state and the accused denies the latter due process of law."[210]

The *Tumey* doctrine was recently extended in *Ward v. Village of Monroeville.*[211] In *Ward,* the mayor-judge had no direct pecuniary interest in convicting the accused, but the fines he levied constituted somewhere between forty and fifty percent of the village revenues. Finding a violation of due process, the Court stated that the mayor-judge's interest as chief executive officer of the village presented a "possible temptation" by which "the mayor's executive responsibilities for village finances may make him partisan to maintain the high level of contribution from the mayor's court."[212]

Although the foregoing cases involved due process in the criminal context, the Court in *Gibson v. Berryhill,*[213] extended the *Tumey-Ward* rationale to the administrative arena. The issue in *Gibson* was whether the Alabama Board of Optometry was a fair tribunal to determine whether it was "unprofessional conduct" for an optometrist to practice in Alabama as a salaried employee of a business corporation. The Board of Optometry consisted exclusively of privately practicing optometrists and included none who were either salaried or employed by business corporations. Furthermore,

207. *Id.* at 524.

208. *Id.* at 525.

209. *Id.* at 532.

210. *Id.* The Court went on to point out that the pecuniary interest of the mayor was not the sole reason for finding a denial of due process. Here, the Court focused upon the *position* of the mayor with respect to the city and stated:

> With his interest, as mayor, in the financial condition of the village, and his responsibility therefor, might not a defendant with reason say that he feared he could not get a fair trial or a fair sentence from one who would have so strong a motive to help his village by conviction and a heavy fine?

Id. at 533. The Court thereupon held that defendant was entitled to halt the proceedings because the judge was disqualified in two ways—because of his direct pecuniary interest in the outcome and because of his official motive. *Id.* at 535.

211. 409 U.S. 57 (1972).

212. *Id.* at 60.

213. 411 U.S. 564 (1973).

only privately practicing optometrists were eligible to become members of the Alabama Optometric Association, and by statute only such members could sit on the Board of Optometry. The Association filed charges of unprofessional conduct with the Board of Optometry against nine optometrists who were employed on a salaried basis by Lee Optical Company, a business corporation. Upon filing of the charges, the Board of Optometry deferred hearing thereon and filed its own lawsuit in state court charging Lee Optical Company and its optometrist-employees with unlawful practice of optometry.

After prevailing[214] in the trial court, the Board prepared to hear and decide the charges levelled by the Association. Approximately two weeks before the scheduled hearings, the individual optometrists brought suit[215] in federal district court seeking an injunction against the hearings on the grounds that the statutory scheme of optometry regulation was unconstitutional. The thrust of the complaint was that the Board was biased and could not provide plaintiffs with the fair and impartial tribunal required by due process. Thereafter, a three-judge court entered judgment for plaintiffs and enjoined the hearings, stating that the inquiry was not whether the Board members were "actually biased but whether, in the natural course of events, there is an indication of a possible temptation to an average man sitting as a judge to try the case with bias for or against any issue presented to him."[216]

The Supreme Court affirmed the district court on the issue of bias but vacated and remanded the decision for reconsideration in

214. The state court dismissed the suit as to the individuals, but enjoined Lee Optical Company from practicing optomery without a license and from employing licensed optometrists. *Id.* at 569.

215. Plaintiffs sued under the Civil Rights Act of 1871, 42 U.S.C. § 1983 (1976).

216. Berryhill v. Gibson, 331 F. Supp. 122, 125 (M.D. Ala. 1971). The possibility of bias was found to arise from a number of factors. First, the Board, which acted as both prosecutor and judge in delicensing proceedings, had previously brought suit against the plaintiffs on virtually indentical charges in the state courts. This indicated to the district court that the Board members might have "preconceived opinions" with regard to the cases pending before them. Second, the court found that the Lee Optical Company did a large amount of business in Alabama, and that if it were forced to suspend operations, the individual Board members, along with other private practitioners of optometry, would fall heir to this business. Thus, there existed a "serious question of a personal financial stake in the matter in controversy." Finally, the court regarded the Board as a suspect adjudicative body because only members of the Alabama Optometric Association could be members of the Board, and because the Association excluded from membership optometrists (such as the plaintiffs) who were not self-employed. The result was that 92 of the 192 practicing optometrists in Alabama were denied participation in the governance of their own profession. 411 U.S. at 571. Therefore, the district court ultimately concluded "that to require the Plaintiffs to resort to the protection offered by state law in these cases would effectively deprive them of their property, that is, their right to practice their professions, without due process of law and that irreparable injury would follow in the normal course of events." 331 F. Supp. at 126; 411 U.S. at 571-72.

light of two later state court decisions.[217] The Court noted that the district court considered either source of possible bias—prejudgment of the facts or personal interest—sufficient to disqualify the Board. The Court, however, affirmed only on the ground of "possible personal interest," stating that the financial stake need not be as direct or positive as it appeared in *Tumey* and that "the pecuniary interest of the Board of Optometry had sufficient substance to disqualify them, given the context in which this case arose."[218]

2. Personal Abuse

Mayberry v. Pennsylvania[219] exemplifies the personal abuse strand of the analysis. In *Mayberry* the Court was concerned with a criminal trial in which defendant, who represented himself, repeatedly engaged in disruptive conduct and made insulting and slanderous remarks to the judge.[220] When defendant was brought before the judge for sentencing after the jury found him guilty, the trial judge pronounced him guilty of eleven criminal contempts arising from his conduct during the trial and sentenced him to a total of eleven to twenty-two years thereon. The sentence was affirmed by the Pennsylvania Supreme Court.[221]

The United States Supreme Court vacated and remanded the decision, terming the attack on the judge "vicious" and "brazen."[222] The Court concluded that the judge, when "called upon to act in a case of contempt by personal attack upon him," should have asked that one of his fellow judges take his place, since there were "marked personal feelings . . . on both sides."[223] Thus, the Court concluded that Mayberry had been denied due process since a judge who was so cruelly slandered was unlikely to have maintained "that calm detachment necessary for fair adjudication,"[224] a fact that de-

217. In the interim, the Alabama Supreme Court reversed the judgment of the trial court, *see* note 214 *supra*, holding that nothing in the Alabama statutes pertaining to optometry evidenced "a legislative policy that an optometrist duly qualified and licensed under the laws of this state may not be employed by another to examine eyes for the purpose of prescribing eyeglasses." Lee Optical Co. v. State Bd. of Optometry, 288 Ala. 338, 346, 261 So. 2d 17, 24 (1972).

218. 411 U.S. at 578-79. *See* note 216 *supra* and accompanying text.

219. 400 U.S. 455 (1971).

220. For example, he called the judge a "dirty sonofabitch," a "dirty tyrannical old dog," a "stumbling dog," and a "fool" and charged the judge with running a "Spanish Inquisition," and told him to "Go to hell" and "Keep your mouth shut." *Id.* at 455-62.

221. Commonwealth v. Mayherry, 434 Pa. 478, 255 A.2d 131 (1969).

222. 400 U.S. at 462-63.

223. *Id.* at 464.

224. *Id.* at 465.

prived the "proceeding of the appearance of evenhanded justice which is at the core of due process."[225]

3. Enmeshment in Other Matters

Johnson v. Mississippi[226] demonstrates the situation in which a litigant is denied due process by reason of the judge's enmeshment in other matters involving the same litigant. In *Johnson,* petitioner, a civil rights worker, was charged with criminal contempt and ordered removed from the court. Before a hearing could be held on the contempt charge, however, petitioner filed a motion asking that the judge recuse himself on the grounds of personal prejudice against petitioner, the civil rights organization he represented, and the lawyers' organization that was defending him.[227] The trial judge held petitioner in contempt and the Mississippi Supreme Court affirmed.[228]

The United States Supreme Court reversed in a per curiam decision. The Court emphasized that it was not relying totally on the affidavits of lawyers reciting intemperate remarks of the judge concerning civil rights litigants. "Beyond all that was the fact that [the judge] immediately prior to the adjudication of contempt was a defendant in one of petitioner's civil rights suits and a losing party at that."[229] Since that "so enmeshed [him] in matters involving petitioner," it was appropriate that another judge sit because "[t]rial before 'an unbiased judge' is essential to due process."[230]

4. Prejudgment Because of Prior Involvement

In *In re Murchison*[231] the Court overturned a Michigan system under which a judge could preside in a contempt proceeding after having served as the one man grand jury out of which the contempt charges arose.[232] Focusing upon the difficulty of freeing the judge

225. *Id.* at 469 (Harlan, J. concurring).

226. 403 U.S. 212 (1971).

227. Five days before being adjudged in contempt, petitioner and others filed suit to enjoin trials of negroes and women in the Circuit Court of Grenada County until such time as negroes and women were not systematically excluded from juries. Judge Perry, who was to hold petitioner in contempt, was a named defendant. The federal court, two days before petitioner was adjudged in contempt, temporarily enjoined Judge Perry from discrimination "by reason of race, color, or sex" in jury selections. *See id.* at 214.

228. Johnson v. State, 233 So. 2d 116 (Miss. 1970).

229. 403 U.S. at 215.

230. *Id.* at 215-16.

231. 349 U.S. 133 (1955).

232. In *Murchison,* the judge, so acting as grand jury, charged two witnesses with contempt, one for refusal to answer any questions, and the other for perjury. The same judge subsequently tried, convicted, and sentenced them for contempt. *Id.* at 134-35.

from the influence of what took place in the "grand jury" session of the judge's familiarity with the facts,[233] the Court held that the procedure was a denial of due process because the judge, in passing on guilt or innocence, very likely relied on "his own personal knowledge and impression of what had occurred [there]."[234]

Prior involement as a basis for disqualification or "combination of functions," as it is often referred to, emerged again in *Goldberg v. Kelly,*[235] in which the Court held that New York's provision for post-termination hearings did not meet the procedural due process requirement for termination of welfare benefits. Instead, the Court required that recipients be afforded an evidentiary hearing before termination of benefits. The Court added, however, that "of course, an impartial decision maker is essential" and while "prior involvement in some aspects of a case will not necessarily bar a welfare officer from acting as a decision maker, [h]e should not . . . have participated in making the determination under review."[236]

More recently, in *Withrow v. Larkin,*[237] the Court eschewed a flat rule that prior involvement of a tribunal as accuser, investigator, or prosecutor necessarily precludes participation as adjudicator. In *Withrow,* a state examining board, composed of practicing physicians, first investigated and issued findings and conclusions regarding probable cause to believe a physician had violated statutes regulating the practice of medicine and then determined whether in fact the statutes had been violated. Although the Court concluded that "the combination of investigative functions does not, without more, constitute a due process violation," this "[did] not, of course, preclude a court from determining from the special facts and circumstances present in the case before it that the risk of unfairness is intolerably high."[238] The Court nevertheless held the mere combina-

233. *Id.* at 138.

234. *Id.*

235. 397 U.S. 254 (1970).

236. *Id.* at 271. In Morrissey v. Brewer, 408 U.S. 471 (1972), the Court held that a parolee is entitled to a hearing before a "neutral and detached" board before his parole is revoked and to a preliminary determination that there is probable cause to hold him pending that hearing. The preliminary determination that reasonable ground exists for revocation of parole should be made by someone not directly involved in the case. *Id.* at 486.

237. 421 U.S. 35 (1975).

238. *Id.* at 58. The Court distinguished *Murchison, Goldberg,* and *Morrissey*:

> Clearly, if the initial view of the facts based on the evidence derived from nonadversarial processes as a practical or legal matter foreclosed fair and effective consideration at a subsequent adversary hearing leading to ultimate decision, a substantial due process question would be raised. But in our view, that is not this case.

Id. The Court pointed out that *Morrissey* actually stood for the proposition that when review of an initial decision is mandated, the decision maker must not be the one who made the initial decision under review. Thus, allowing a decision maker to review and evaluate his own

tion of functions did not overcome the presumption of honesty and integrity of those serving as adjudicators,[239] even though it reaffirmed the underlying principles of the prior decisions in the area.[240]

5. Summary

The due process clause, through its guarantee of an impartial tribunal in which to adjudicate disputes, works in four distinct ways. Due process is violated if the adjudicator has a pecuniary interest in the outcome, if the adjudicator has been the target of personal abuse by the litigator, or if he is "enmeshed" in other matters involving the litigant. Finally, due process may be violated by combination of investigative and adjudicative functions. In order to utilize the separation of functions challenge, however, one must also overcome the presumption that agencies are acting in good faith in carrying out their duties. Only one of these four challenges must succeed in order to find a denial of due process. In this regard, one must apply the standards set forth by the Court to motor vehicle legislation to determine whether the particular state board that is charged with administering the statute comports with due process.

B. Applicability of the Due Process Challenge to State Motor Vehicle Authorities

The challenge to board composition would be available only in those states in which the administrative authority that regulates the manufacturer-dealer relationship is composed totally or primarily of automobile dealers.[241] Thus, in those states in which there is no agency, or in which there is an independent state authority, or in which supervision is left to the courts, presumably the manufacturers are being treated fairly. Before turning to the cases in which the due process-board composition challenge has been voiced, however, it is instructive to review several of the functions of these boards, many of which are weighted *totally* in favor of the automobile dealer.

First, the board may be concerned with licensing the manufac-

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prior decisions raised problems that were not present in *Morrissey* since the board was at no point called upon to review its own prior decisions. *Id.*

239. A party must thus convince a court that the conferral of investigative *and* adjudicative powers upon the same individuals poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented. 421 U.S. at 47.

240. "Not only is a biased decisionmaker constitutionally unacceptable but our 'system of law has always endeavored to prevent even the probability of unfairness.'" *Id. See also* notes 206-10 *supra.*

241. *See* notes 115-17 *supra* and accompanying text.

turer as well as other dealers.[242] This is particularly important in states in which license revocation is used as a sanction[243] since all the board members then have inherent pecuniary interests. For example, if the manufacturer's license is called before the board for revocation and several of the board members were also franchisees of that manufacturer, would these members be so willing to revoke their own supplier's license to sell automobiles within their state? One would think not because this would force every franchisee of that particular manufacturer out of business due to his franchisor's loss of license. On the other hand, suppose that franchisees of competing manufacturers who were on the board believed that they could gain competitively by revoking another manufacturer's license and thereby driving opposing dealers out of business. When viewed in this light, the similarity to *Gibson v. Berryhill* becomes painfully obvious.[244]

Furthermore, these same authorities may oversee and decide whether terminations or establishment[245] of particular franchises are proper. Similarly, an automobile dealer would be biased in virtually every case. When a dealer is to be terminated by the manufacturer, the only question is in whose favor the board may be biased. If the dealer-members appreciated their positions as franchisees, they might be biased in favor of the dealer.[246] On the other hand, if they considered the effect of the gain or loss of one dealer on their businesses, their perception of the equities might tilt in favor of the manufacturer. This consideration is especially appropriate when a manufacturer seeks to establish a new franchise in an area.

One final situation in which the bias of the dealer-members may arise is when they are called upon to decide the reasonableness

242. *See* note 109 *supra* and accompanying text.

243. *See* notes 174-77 *supra* and accompanying text.

244. That, however, could be the incredible result, particularly in those states that have no statutory provision allowing the board to limit license revocation to a particular area. It could happen even in some states that give the board *discretion* to so limit license revocation. *See* notes 174-75 *supra* and accompanying text. Furthermore, this bias would exist if dealers' licenses were being considered for revocation. The only difference is in magnitude.

245. *See* notes 121-43 *supra* and accompanying text.

246. This analysis was used in American Motors Sales Corp. v. New Motor Vehicle Bd., 69 Cal. App. 3d 983, 138 Cal. Rptr. 594 (1977), in which the court stated:

> The conclusion is unavoidable that dealer-members of the Board have an economic stake in every franchise termination case that comes before them. The ability of manufacturers to terminate any dealership, including that of a Board member, depends entirely upon the Board's interpretation of "good cause." It is to every dealer's advantage not to permit termination for low sales performance, which fact is to every manufacturer's disadvantage.

Id. at 987, 138 Cal. Rptr. at 596. The same rationale applies when one decides what warranty reimbursement is "fair and adequate." It is to every dealer's advantage, including those on the Board, to keep reimbursement rates high.

of a manufacturer's warranty rate reimbursement.[247] Here, although the self-interest of the dealer making the decision is not directly in issue, it is certainly highly relevant. In the back of the member-dealers' minds are their own warranty reimbursement rates. If they feel their own rate is adequate, then a dealer whose rate is higher might be denied that rate although it be entirely reasonable. Quite often, however, the converse is true. If a dealer's rate is deemed "reasonable" by the board, then the dealer-members of the board would feel justified in increasing their own reimbursement formulas. Thus, there could be a never-ending cycle, a result highly inequitable to manufacturers.

With the number of statutes regulating manufacturer-dealer relations, it is probably not surprising that the courts have spoken to this particular aspect of the regulatory schemes. *Ford Motor Co. v. Pace*[248] exemplifies both the pre-*Gibson* justification and the post-*Gibson* arguments that favor the validity of these boards. In *Pace,* a successful challenge was made to the entire Tennessee motor vehicle regulatory scheme in the trial court. The Tennessee Supreme Court, however, reversed the lower court and upheld the validity of the scheme.[249]

One challenge made to the Tennessee statute was based on the fact that the Tennessee Motor Vehicle Commission was entirely composed of dealers. Ford contended that the Commission was inherently biased and partial. The court rejected this challenge, pointing out that "practically all the regulatory boards" were "made up of members of the profession which that board governs" and who have "knowledge of their profession."[250] To the court, the

247. *See* notes 159-73 *supra* and accompanying text.

248. 206 Tenn. 559, 335 S.W.2d 360, *appeal dismissed,* 364 U.S. 444 (1960), *rehearing denied,* 364 U.S. 939 (1961).

249. In so doing, the court considered a number of challenges to the act's validity. For example, the statute was initially alleged to be outside the scope of the police power since it did not promote "the health, safety, moral or general welfare of the general public." *Id.* at 564, 335 S.W.2d at 362. This the Tennessee court brushed aside in a flurry of citations, quotations, and the "judicial knowledge" that "[t]he highways are crowded." *Id.* at 564-65, 335 S.W.2d at 362-63. The number of vehicles and their importance to society are sufficiently important to warrant regulation of *motor vehicles,* but how does that reach the *manufacturer-dealer relationship*? Perhaps today a court would not so glibly brush aside the argument that these laws are not within the scope of the police power, particularly after *General GMC Trucks. See* note 106 *supra.* The court likewise put aside any notions that the law burdened interstate commerce through citations and quotations from state cases holding in accordance with their views while finding "unpersuasive" a contrary decision in General Motors Corp. v. Blevins, 144 F. Supp. 381 (D. Colo. 1956). 206 Tenn. at 572-74, 335 S.W.2d at 366. *See* notes 106 & 151 *supra.* The court, however, did find two small portions of the act unconstitutional. 206 Tenn. at 580, 335 S.W.2d at 369.

250. *Id.* at 575, 335 S.W.2d at 367.

reason for this was "obvious."[251] Obvious or not, it is doubtful that this rationale could survive analysis under current Supreme Court analysis.[252]

At least one court has recognized the effect of subsequent decisions upon the *Pace* reasoning. In *American Motors Sales Corp. v. New Motor Vehicle Board*[253] the California Court of Appeals held that the mandated presence of four car dealers on the New Motor Vehicle Board, when considered in combination with a lack of any counterbalance in mandated manufacturer members, the nature of the adversaries in all cases (dealers versus manufacturers), and the nature of controversy in all cases (manufacturer-dealer dispute), operated to deprive manufacturer-litigants of due process for want of an impartial tribunal.[254] Tracing the history of due process limitations on pecuniary conflicts of interest,[255] the court noted that the Board was erroneously equating the issue with that involved in cases holding that a regnlatory body may constitutionally be composed in whole or in part of members of the regulated profession.[256] The court, however, stated that in the instant case "[n]o longer did the Board solely sit in judgment upon new car dealers in such matters as eligibility and qualification for a license, regulation of practices, discipline for rule violations, and the like."[257] Instead, the Board "was given the added power to intrude upon the contractual rights and obligations of dealers and their product suppliers."[258] Thus, the court noted that instead of merely regnlating their own kind, the dealers began to regnlate the economics of contractual relations of others *with* their own kind. This factor, in the court's view, took the case outside the traditional rule of peer regulation because car dealers had no unique or particular expertise appropriate to the regulation of business affairs of car manufacturers.

The court was nevertheless careful to state that its holding did not rest on the mere status of the dealers. Instead, the dealers were held to have a "substantial pecuniary interest" in franchise termination cases.[259] This, coupled with the mandated presence of dealers

251. *Id.* One wonders why that is so obvious here.

252. *See* notes 196-240 *supra* and accompanying text.

253. 69 Cal. App. 3d 983, 138 Cal. Rptr. 594 (1977).

254. *See id.* at 992, 138 Cal. Rptr. at 600.

255. *Id.* at 988-90, 138 Cal. Rptr. at 597-98. *See* notes 206-18 *supra* and accompanying text.

256. 63 Cal. App. 3d at 990, 138 Cal. Rptr. at 598.

257. *Id.* at 991, 138 Cal. Rptr. at 598-99.

258. *Id.*, 138 Cal. Rptr. at 599.

259. Presumably, if they have a "substantial pecuniary interest" in franchise termination cases, they would also have such interests in establishment cases, license revocation

on the Board, prevented fair and unbiased hearings in violation of due process.[260] The dealer's association, as amicus curiae, argued that any bias was insignificant since in cases in which the franchise of a dealer-member's direct competitor was being terminated or in which the member wished to ingratiate himself with his own manufacturer, the dealer-member would be more financially interested in ruling in favor of the manufacturer. The court rejected the argument,[261] but the mere fact that it was *made* demonstrates an incredible fact—dealers are willing to incur occasional unfairness to one of their own kind rather than risk losing their stranglehold on manufacturers.

Other courts have been unwilling either to follow or recognize the decision in *New Motor Vehicle Board.* The Georgia courts, at approximately the time of the California decision, reached a contrary result in *General GMC Trucks, Inc. v. General Motors Corp.*,[262] while simultaneously holding portions of its motor vehicle franchise statute unconstitutional on much broader grounds. In *General GMC,* the trial court ruled that the composition of the Georgia Franchise Practices Commission[263] caused it to be prejudiced in favor of franchised dealers because they comprised a majority of the commission. The Georgia Supreme Court reversed the trial court in rather cryptic fashion. The court merely cited the general rule that it is acceptable for members of a profession to serve on commissions that oversee the practices of that profession, and stated that "members of a commission are presumed to be fair and impartial."[264] In the court's view, the manufacturer had failed to overcome that presumption.

Similarly, the Tennessee Court of Appeals in *Volkswagen of America v. Tennessee Motor Vehicle Commission,*[265] upheld a state

cases, and warranty reimbursement cases under the court's test since in each situation all the factors of the test remain the same. For those factors, see text accompanying note 254 *supra.*

260. The California court perhaps gave the Tennessee court a dose of its own medicine, finding the *Pace* decision "not . . . persuasive." *Id.* at 992 n.7, 138 Cal. Rptr. at 599 n.7. *See* note 249 *supra.*

261. *Id.* at 987, 138 Cal. Rptr. at 596. The court viewed this not as fairness but as equalizing unfairness with more unfairness. The argument's appearance suggests that the court was persuaded by the "appreciation of similar position" argument voiced by this author. *See* text accompanying note 246 *supra.* This line of analysis would most clearly carry over into the warranty rate reimbursement cases. *See* notes 167-73 *supra.*

262. 239 Ga. 373, 237 S.E.2d 194, *cert. denied,* 434 U.S. 996 (1977). *See* note 106 *supra.*

263. The commission was composed of nine members, five of whom were required to be dealers. GA. CODE ANN. § 84-6604 (1979).

264. 239 Ga. at 375, 237 S.E.2d at 195.

265. Davidson Equity No. A-7901-I (Tenn. App. Sept. 8, 1978). The appellate court, with no opinion of its own, merely quoted the Chancellor's memorandum opinion from the trial court.

board. The statute creating the Tennessee Motor Vehicle Commission is neutrally worded, requiring only that members be actively engaged in the manufacturing, distribution, or sale of motor vehicles.[266] To date, however, these industry members have consisted *solely* of automobile dealers. This is unsurprising because the statute requires members to be residents of Tennessee,[267] and no manufacturers are. Thus, they are precluded from board participation irrespective of the neutral wording of the statute. Confronted with this fact and the resulting inherent unfairness of the Board, the court responded:

> The record in this case does not show the composition of the Commission. . . . The plaintiff argues, that since there are no manufacturers in Tennessee, there are no representatives of manufacturers on the Commission. However, the record is completely silent as to that point. The Court will not notice matters outside the record to rebut the presumption that members of an agency will discharge their responsibilities in an honest manner.[268]

Both the Tennessee and Georgia courts, therefore, relied upon the "presumption of good faith" language of *Withrow* and the fact that other regulatory boards were composed of regulated members. In due process analysis, however, good faith is relevant *only* in situations in which the due process violation allegedly consists of a "combination of functions" within the particular agency.[269] Thus, when the alleged violation is a *pecuniary interest,* no amount of good faith will rescue the commission. As the United States Supreme Court stated, "[t]he requirement of due process of law . . . is not satisfied by the argument that men of the highest honor and the greatest self-sacrifice could carry it on without danger of injustice."[270] Therefore, these courts do not carry their analysis far enough. "Separation of functions" alone is probably *not* enough to strike down these commissions, but their demonstrated and recognized[271] *pecuniary interest* is. From this, one can only conclude that these courts have erred and that many motor vehicle commissions violate due process irrespective of the fact that other commissions

266. *See* note 117 *supra.* At approximately the same time the suit arose, the Tennessee General Assembly increased the size of the commission, adding two "consumer" members. 1977 Tenn. Pub. Acts ch. 162, § 14 *codified as* TENN. CODE ANN. § 59-1703 (Supp. 1979).

267. TENN. CODE ANN. § 59-1703 (Supp. 1979).

268. Volkswagen of America v. Tennessee Motor Vehicle Comm'n, Davidson Equity No. A-7901-I (Tenn. App. Sept. 8, 1978) at 3-4. In so holding, the court ignored the manufacturer's argument tbat Tennessee courts were bound *ex officio* to know the officers of the government. *See e.g.,* Bennett v. State, 8 Tenn. 133 (1827); Brief for Volkswagen at 18, Volkswagen of America v. Tennessee Motor Vehicle Comm'n, Davidson Equity No. A-7901-I (Tenn. App. Sept. 8, 1978).

269. *See* notes 231-40 *supra* and accompanying text.

270. Tumey v. Ohio, 273 U.S. at 532.

271. *See* note 259 *supra* and accompanying text.

regulating other professions are often composed of members of that profession.[272] It is these states that need reform most urgently.[273]

V. Conclusion and Proposals

It is abundantly clear that state motor vehicle franchise legislation is plagued by a number of problems, board composition being merely the one defect upon which this Note has focused.[274] Corrective action is needed either at the state or federal level to provide a system of regulation that is fair to both the dealer and the manufacturer. Undoubtedly, dealers would oppose such legislation.[275]

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272. A central concern in many of these cases seems to be that many commissions regulate their own kind and that to hold motor vehicle commissions unconstitutional would call into question the integrity of many other regulatory boards. In *New Motor Vehicle Board,* the Board in its brief listed 21 other boards, a majority of whose members were also members of the regulated profession. 69 Cal. App. 3d at 986 n.4, 138 Cal. Rptr. at 596 n.4. Similarly, in the *Volkswagen* case the courts were bombarded with a list of 34 other boards that were made up of regulated members. *See* Tennessee Motor Vehicle Commission's reply to petition for certiorari at 30-31 (Copy on file with *Vanderbilt Law Review*). This, however, overlooks the fact that many of these commissions, unlike motor vehicle commissions that regulate such things as warranty rate reimbursement and *manufacturers* as well as dealers, actually have built in protections against the possibility of bias. *Cf., e.g.,* Tenn. Code Ann. § 57-807 (Alcoholic Beverage Comm'n—no person having an interest in the liquor industry may have a position on the commission); Tenn. Code Ann. § 63-601 (Board of Medical Examiners—no board member may have a connection with a medical school); Tenn. Code Ann. § 62-402 (Board of Cosmetology—no board member may have a connection with a beauty school); Tenn. Code Ann. § 63-402 (Board of Examiners of Chiropractors—no board member may have a private practice or a connection with a school). As was so well stated by the California court in *New Motor Vehicle Board:*

> We have no quarrel with [the holdings that licensing or regulatory agencies may constitutionally be composed in whole or in part of members of the business or profession regulated]. Indeed who can better judge the qualifications to practice of a doctor of medicine (as one example), or his adherence to ethical standards of the medical profession, than other doctors of medicine?
>
> . . .
>
> [The motor vehicle board dealers, however, do not] regulate their own kind; they . . . regulate the economic and contractual relations of [manufacturers and] . . . car dealers have no unique or peculiar expertise appropriate to the regulation of business affairs of car manufacturers.

69 Cal. App. 3d at 990-91, 138 Cal. Rptr. at 598-99. To this argument, what can be the response?

273. These states include Arkansas, Georgia, Hawaii, Idaho, Kansas, Louisiana, Mississipp, Nehraska, Ohio, Oklahoma, Pennsylvania, Rhode Island, Tennessee, and Texas. As previously noted, however, while the primary thesis of this Note has focused upon the denial of due process with respect to certain motor vehicle boards, massive reform is urged due to the host of constitutional problems that face the legislation as a whole. Several of these challenges have been suggested but not fully developed. *See* notes 106, 133, 136, 163 & 169 *supra* and accompanying text.

274. The Note, however, did attempt to lay the framework for a number of challenges. *See* notes 106, 133, 136, 163 & 169 *supra.* Hopefully, this will be of use to the practitioner or legal scholar who finds himself imprisoned in this area of the law.

275. Recall the fate of the proposed Motor Vehicle Act of 1940. *See* notes 68-69 *supra* and accompanying text. Dealers opposed the bill ostensibly on the ground that they feared

A. State Regulatory Reform

Possibly the best reform that any state could undertake is repeal of those laws that are administered at a very high cost. This would cause dealers little detriment since many of the protections they seek are covered quite handily under the Federal Good Faith Act. Under the Act they are protected against bad faith terminations, establishment of "stimulator" dealers, "forcing" of unwanted automobiles and parts, and coercion through discrimination among dealers.[276] Furthermore, the manufacturer is held to a standard of good faith in the manner in which he reimburses his dealer for warranty work or sets sales quotas.[277] The dealers do lose something in those states that provide for more damages.[278]

In any event, states that utilize boards or commissions to administer their statutes and that are within those criticized in this Note should immediately abolish these agencies and transfer their responsibilities to another board. For example, in many states, these could be easily handled by the states' public service commission, or its equivalent.[279] These commissions traditionally handle such matters as licensing routes for truck lines and hearing requests for rate increases by utilities and carriers.[280] Their expertise would carry over to such areas as establishment of dealer franchises and hearings on warranty rates.

"extensive federal regulation." Kessler, *supra* note 31, at 1172. Yet, that bill contained many protective provisions that the dealers have since begged for. *Compare* C. HEWITT, *supra* note 13, at 266-72 (Motor Vehicle Act of 1940) *with* statutes discussed in Part II D *supra*. Thus the dealers have swapped "extensive federal regulation" for extensive, confusing, vague, and possibly unconstitutional state legislation that they feel is more favorable.

276. *See* note 81 *supra* and accompanying text.

277. *See, e.g.*, Autohaus Brugger, Inc. v. Saab Motors, Inc., 567 F.2d 901 (9th Cir. 1978).

278. The Dealer's Day In Court Act provides only for actual damages, 15 U.S.C. § 1222 (1976), while several states allow recovery of double or treble damages. *See* notes 184-85 *supra* and accompanying text.

279. For example, there is no reason why the duties of the Tennessee Motor Vehicle Commission could not be transferred to the Tennessee Public Service Commission. *See* TENN. CODE ANN. §§ 65-101 to -68 (Supp. 1979). The Commission already regulates railroads, public utilities, and motor carriers and has the power to regulate rates. Also, no member may have an interest in any business or company that the Commission regulates. TENN. CODE ANN. § 65-104 (1976). The California legislature, in response to *American Motors Sales Corp. v. New Motor Vehicle Board* enacted CAL. VEH. CODE § 3050(d) (West Supp. 1979), which provides that "no memher of the board who is a . . . dealer may participate in, deliberate on, hear or consider, or decide, any matter involving [termination or establishment of franchises or warranty reimbursement]." Similarly, Kentucky provides that the dealer board shall have no control over manufacturers. KY. REV. STAT. § 190.041 (Supp. 1978). These states and those that either have no board or utilize the courts or other law enforcement authorities as administrators demonstrate that states may function very well without dealer supervision of manufacturers.

280. *See, e.g.*, TENN. CODE ANN. §§ 65-401 to -407, 65-1501 to -1525 (Supp. 1979).

Warranty rate reimbursement is another area of concern. Those states that presently allow the dealer to charge whatever he pleases[281] should undertake drastic changes. These legislatures should either create a formula that accounts for the relevant factors that affect the public interest[282] or model legislation after those states that seem to have achieved a fair and equitable balance between the interests of the dealers and the manufacturers, as well as those of the public.[283]

Last, the states should be wary of protecting dealers from legitimate competition through restrictions on establishment of other franchises. If the true concern in this situation is, as it should be, the needs of the *public,* presumably a similar analysis as is utilized in deciding whether to grant a truck line a new route could be used.[284] That is, a commission or other body would concentrate upon the good to the public that would flow from additional dealerships.

One should not conclude from this discussion, however, that states should remain in the motor vehicle franchise game. The automobile industry is a national industry that demands uniform standards to replace the present hodgepodge of conflicting state provisions. Thus, federal reform is needed in order to impose uniformity and nationwide dual fairness.

B. Proposal—An FTC Franchise Agreement

The Federal Trade Commission is the obvious agency with which to vest the power to oversee the manufacturer-dealer franchise relationship. Many of the abuses that dealers fear are termed "unfair practices" over which the FTC has traditionally exercised authority.[285] Furthermore, this would not be the first time that a

281. *See* notes 168-69 *supra* and accompanying text.

282. *See* note 173 *supra* and accompanying text.

283. *See* note 164 *supra* and accompanying text.

284. This is traditionally decided on the basis of "public convenience and necessity." *See, e.g.,* TENN. CODE ANN. § 65-1507 (Supp. 1979). At least one state uses this standard for the establishment of automobile franchises. *See* S.D. CODIFIED LAWS ANN. § 32-6A-3 (1976).

285. The Supreme Court has ruled that the FTC has broad remedial powers in enforcing its mandate under the FTC Act to prevent unfair and deceptive trade practices. In Jacob Siegel Co. v. FTC, 327 U.S. 608 (1946), the Court noted that "[t]he FTC is the expert body to determine what remedy is necessary to eliminate unfair or deceptive practices which have been disclosed. It has wide latitude for judgment and the courts will not interfere except where the remedy has no reasonable relation to the unlawful practice found to exist." *Id.* at 612-13. The Court has also recognized the FTC's authority to determine what trade practices are unfair or deceptive and has given the FTC broad latitude in this. *See* FTC v. Sperry & Hutchison Co., 405 U.S. 233 (1972). Furthermore, it is now recognized that the FTC has the power to promulgate rules having the effect of substantive law which could preempt state law. *See* National Petroleum Refiners Ass'n v. FTC, 482 F.2d 672 (D.C. Cir. 1973), *cert. denied,* 415 U.S. 951 (1974).

proposal has been made to grant the FTC such authority.[286]

Under this proposal, either Congress, through legislation, or the FTC, through rulemaking, would promulgate substantive terms for automobile franchise agreements. Under this arrangement, it would be an unfair or deceptive act within the meaning of section five of the act for a manufacturer to distribute automobiles in interstate commerce unless the distribution takes place pursuant to written franchise agreements that contain the terms set forth by law.[287] This would not be an overly burdensome task for the FTC since it has recently promulgated a trade regulation rule, formally titled "Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunity Ventures."[288] The rule requires franchisors to disclose to prospective franchisees detailed information about their franchises prior to investment in the franchise. It also prohibits representations concerning actual or potential sales or relating to income or profits of existing or prospective outlets unless the representations meet certain standards.[289]

Since the FTC has already undertaken this extensive regulation of franchises, it would impose little additional burden to amass those terms that should be legislated because existing or proposed statutory or industry standards could be employed.[290] Therefore, one need only be concerned with the areas to be covered. The proposed terms cover those that have traditionally caused problems—termination, coercion, "forcing" of unwanted automobiles and parts, delivery, and warranty reimbursement. Presumably, under such standards a party would have either a federal or state cause of action in the event of a breach of the "legislated" contract.[291]

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286. *See* notes 65-69 *supra* and accompanying text. Moreover, in many states there would be little change since the statutes require the motor vehicle franchise authority to be "guided" by the FTC Act and the FTC interpretations thereof. *See, e.g.*, ME. REV. STAT. ANN. tit. 10, § 1184 (West Supp. 1978-1979); MASS. GEN. LAWS ANN. ch. 93B, § 3 (West 1972); N.H. REV. STAT. ANN. § 357-B:15 (Supp. 1977); R.I. GEN. LAWS § 31-5.1-3 (Supp. 1978); S.C. CODE § 56-15-30 (1976); VT. STAT. ANN. tit. 9, § 4073 (Supp. 1979).

287. *See* APPENDIX *infra*, for the most pertinent terms proposed.

288. FTC Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunity Ventures, 16 C.F.R. § 436 (1979).

289. 16 C.F.R. § 436 (1979). *See generally* FRANCHISING, *supra* note 1, at 24-27; Goldherg, *Federal Regulation of Franchises: The Federal Trade Commission Rule*, 59 CHI. B. REC. 338 (1978); Zeidman, *Regulation of Franchising by the Federal Trade Commission: A Critique of the Proposed Trade Regulation Rule*, 28 BUS. LAW. 135 (1972).

290. That is the approach taken in the proposal. *See* APPENDIX *infra*. Much of the proposal is drawn from the ill fated Motor Vehicle Act of 1940, see note 65 *supra* and accompanying text, and the reimbursement formula found by one court to he "fair and adequate." *See* note 173 *supra*. Omitted from the provisions are definitional sections and other boilerplate language that either Congress or the FTC would employ to implement the proposal.

291. The dealer or manufacturer would presumably have a binding contract on which

C. Conclusion

Motor vehicle dealers were traditionally subjected to many unfair and oppressive practices by their manufacturers. With the passage of the Dealer's Day In Court Act, many of these practices effectively came to a halt. Dealers nevertheless have pressed for extensive legislation in the states that is either impractical or constitutionally suspect. This legislation has reversed the traditional balance of power in many instances, putting manufacturers at a great disadvantage. To give true parity to the relative bargaining and operating positions of the manufacturer and dealer, reform, preferably on the federal level, is sorely needed.

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to sue in either federal or state court. A provision might also be included for an express right of action allowing recovery of double or treble damages should Congress enact a separate provision. Should the FTC promulgate the provisions as a rule, apparently no private right of action would exist, since section 5 of the FTC Act bas been interpreted to offer no implied private right of action. *See* Holloway v. Bristol-Myers Corp., 485 F.2d 986 (D.C. Cir. 1973); Atlanta Brick Co. v. O'Neal, 44 F. Supp. 39 (E.D. Tex. 1942). *See generally* Mowe, *Federal Statutes and Implied Private Actions,* 55 ORE. L. REV. 3 (1976).

APPENDIX

PROPOSED SUBSTANTIVE AUTOMOBILE FRANCHISE TERMS

(a) Every contract between a manufacturer of motor vehicles and a dealer in motor vehicles to which this act [rule] applies shall:

(1) Obligate the manufacturer, for a specified period of time (in no case less than three years) to sell and deliver in each month of such period to such dealer for resale such number of motor vehicles as may be agreed upon not more than 180 days prior to the beginning of such month, and obligate the manufacturer not to discriminate among dealers in either sales or deliveries; *provided,* however, that the manufacturer shall not be liable for nonperformance resulting from an Act of God, strike, war, invasion, riot, insurrection, fire, flood, or other incident that is outside the control of the manufacturer;

(2) If the contract authorizes or permits the manufacturer to control the dealer's business, within the meaning of subsection (b) of this section, obligate the manufacturer, upon termination or failure to renew the contract:

(i) to purchase from the dealer all new motor vehicles purchased by the dealer from the manufacturer and unsold by the dealer and all parts and accessories likewise purchased and unsold, at prices equal to those originally paid by the dealer for such motor vehicles, parts, and accessories delivered at the dealer's place of business;

(ii) to purchase all tools and equipment purchased from or on recommendation of the manufacturer, at prices to be mutually agreed upon, or in the event of failure to agree, at prices determined in accordance with subsection (d) of this section;

(iii) to purchase all motor vehicles purchased by the dealer from the manufacturer and used as demonstrators at prices to be mutually agreed upon, or in the event of the failure to so agree, at prices determined in accordance with subsection (d) of this section;

(iv) to purchase all used motor vehicles in the dealer's inventory [other than those described in paragraph (iii)] at prices to be mutually agreed upon, or in the event of the failure to so agree, at prices determined in accordance with subsection (d) of this section;

(v) to assume any lease entered into by the dealer, with the written consent of the manufacturer, during the period of the contract or any prior contract;

(vi) in the case of any lease entered into by the dealer without the written consent of the manufacturer, to assume such lease for the period beginning on the effective date of the contract cancellation and ending on the date on which such contract would have expired by its own terms or would have expired by reason of a failure to renew; and

(vii) to purchase all other assets of the dealer that are attributable to his activities as a dealer in motor vehicles at prices to be mutually agreed upon, or in the event of the failure to so agree, at prices determined in accordance with subsection (d) of this section;

(3) Adequately define the duties and responsibilities of each of the manufacturer's agents contacting the dealer, directly or indirectly;

(4) Obligate the manufacturer not to ship to the dealer any motor vehicles, parts, or accessories except on the dealer's written order;

(5) Obligate the manufacturer, if a transportation charge is made, to charge the dealer for transportation of motor vehicles to the dealer's place of business only such transportation costs as are actually incurred in transporting such motor vehicles to such place;

(6) Obligate the dealer, for a specified period of time (in no case less than three years), in each month of such period to purchase from such manufacturer for resale such number of new motor vehicles as may be agreed upon not more than 180 days prior to the beginning of such month; *provided,* however, that the dealer shall not be liable for any failure of performance caused by an Act of God, strike, war, invasion, riot, insurrection, fire, flood, or other incident that is outside the control of the dealer;
(7) Include such provisions that the Commission has found:

(i) provide for the termination or cancellation of the contract by mutual consent or upon breach of specified conditions contained therein, and not otherwise;
(ii) provide that the contract may not be cancelled by the manufacturer or dealer without giving written notice thereof at least 180 days prior to the date of cancellation; and
(iii) provide that if, within 180 days prior to the date on which the contract would expire by its own terms, neither the manufacturer nor the dealer notifies the other of an intention not to renew the contract, the contract shall be automatically renewed on such date for an additional period equal to the period of the original contract.

(b) A manufacturer "controls" his dealer for the purposes of this section if the contract contains any provision that the Commission finds:

(1) To purport to control in any manner the capital investment which the dealer shall make, or purports to control in any manner capital withdrawals or withdrawals of earnings and profits by the dealer;
(2) To purport to control in any manner the character of sales rooms, service facilities, or signs that the dealer shall maintain;
(3) To purport to control in any manner the employment of sales or service personnel by the dealer, or to require the maintenance by the dealer of any specified volume of sales;
(4) To purport to require the dealer to comply with any one or more policies specified by the manufacturer, or by any of his agents; or
(5) To authorize or permit the manufacturer by any other means to control the manner in which the dealer shall conduct his business.

(c) Every contract between a manufacturer of motor vehicles and a dealer in motor vehicles shall provide for warranty rate reimbursement to the dealer in the following manner:

(1) On parts used for warranty work, the manufacturer shall credit the dealer's parts account with the actual cost to the dealer of such parts and, in addition, shall pay the dealer a handling charge thereon equal to twenty-five percent (25%) of such actual cost of the part.
(2) On time allowances for the performance of repair or replacement work the manufacturer shall publish a flat rate schedule, setting for the time required for individual service operations; *provided* that the times fixed by the manufacturer shall be reasonable as found by the Commission.
(3) On warranty labor rate reimbursement, the manufacturer shall reimburse the dealer for labor utilized to fulfill the manufacturer's warranties in the sum of:

(i) Two hundred twenty percent (220%) of the mechanic's hourly wage rate; and

(ii) One hundred fifty percent (150%) of the mechanic's hourly fringe benefits, which shall include paid vacation, pay in lieu of vacation, holiday pay, sick pay, separation allowances, hospital insurance, contributions to retirement or pension plans, uniforms and laundry, and group life insurance.

(d) Every contract between a manufacturer of motor vehicles and a dealer in motor vehicles to which this act [rule] applies shall obligate both the dealer and the manufacturer to accept the decision of an arbitration committee that consists of one member selected by the manufacturer, one member selected by the dealer, and one member selected by the Commission, in all instances under this section in which the parties have provided for but cannot reach a mutual agreement.